THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LO

REFERENCE ONLY

346
Mx North Gallery

UNIVERSITY OF LONDON
LIBRARY

1

THE
LAW REPORTS
1957

Queen's Bench Division

and on Appeal therefrom in the
Court of Appeal
and Decisions in
The Court of Criminal Appeal

Vol. 20

London
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

BIBL.
LONDIN.
UNIV.

EDITORS AND REPORTERS

*

Editor—R. P. Colinvaux, Barrister-at-Law

Assistant Editor—Charles Clayton, Barrister-at-Law

*

REPORTERS

House of Lords	**Privy Council**
F. H. Cowper	Charles Clayton

Court of Appeal No. 1

B. A. Bicknell E. Dangerfield

Court of Appeal No. 2

A. W. Grant

Court of Appeal No. 3

F. R. Dymond M. M. Hill

Chancery Division

J. L. Denison K. R. A. Hart I. G. R. Moses
J. A. Griffiths

Queen's Bench Division, Court of Criminal Appeal and Courts-Martial Appeal Court

J. D. Pennington J. F. Lamb C. J. Ellis
E. M. Wellwood R. P. Price

Probate and Divorce

J. B. Gardner E. Jones

Admiralty Division

A. L. G. Stewart-Richardson

Barristers-at-Law

JUDGES

OF

THE COURT OF APPEAL

1957

Lord Kilmuir, Lord Chancellor

Lord Goddard, Lord Chief Justice of England

Lord Evershed, Master of the Rolls

Lord Merriman — President of the Probate, Divorce, and Admiralty Division

Sir John Edward Singleton (died Jan. 6, 1957)
Sir Alfred Thompson Denning (created a Lord of Appeal April 24, 1957)
Sir David Llewelyn Jenkins
Sir William Norman Birkett (retired Jan. 5, 1957)
Sir Francis Lord Charlton Hodson
Sir John William Morris
Sir Charles Robert Ritchie Romer
Sir Hubert Lister Parker
Sir Frederic Aked Sellers
Sir Benjamin Ormerod
Sir Edward Holroyd Pearce

Lords Justices

JUDGES

OF

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE

1957

Lord GODDARD, Lord Chief Justice of England, President
Sir MALCOLM HILBERY
Sir ROLAND GIFFARD OLIVER (retired Dec. 19, 1957)
Sir WINTRINGHAM NORTON STABLE
Sir JAMES DALE CASSELS
Sir HUGH IMBERT PERIAM HALLETT (retired Sept. 30, 1957)
Sir GONNE ST. CLAIR PILCHER
Sir GEORGE JUSTIN LYNSKEY (died Dec. 21, 1957)
Sir AUSTIN ELLIS LLOYD JONES
Sir LAURENCE AUSTIN BYRNE
Sir DONALD LESLIE FINNEMORE
Sir GEOFFREY HUGH BENBOW STREATFEILD
Sir GERALD OSBORNE SLADE
Sir EDWARD HOLROYD PEARCE
Sir PATRICK ARTHUR DEVLIN
Sir WILLIAM GORMAN
Sir PATRICK REDMOND JOSEPH BARRY
Sir TERENCE NORBERT DONOVAN
Sir WILLIAM LENNOX MCNAIR
Sir CECIL ROBERT HAVERS
Sir COLIN HARGREAVES PEARSON
Sir HILDRETH GLYN-JONES
Sir JOHN PERCY ASHWORTH
Sir KENNETH DIPLOCK
Sir GEORGE RAYMOND HINCHCLIFFE
Sir GILBERT JAMES PAULL
Sir CYRIL BARNET SALMON

Attorney-General

Sir REGINALD EDWARD MANNINGHAM-BULLER

Solicitor-General

Sir HARRY BRAUSTYN HYLTON-FOSTER

The Mode of Citation of the Volumes of the *Law Reports* for 1957, is as follows:—

[1957] Ch. [1957] P.
[1957] 1 Q.B. [1957] 2 Q.B.
[1957] A.C.

TABLE OF CASES REPORTED
IN THIS VOLUME

PAGE

A

Abbey National Building Society, *Ex parte*. Regina *v.* Judge Dutton Briant - 497
Adamastos Shipping Co. Ltd., Anglo-Saxon Petroleum Co. Ltd. *v.* - - - - 233
Addiscombe Garden Estates Ltd. *v.* Crabbe - - 615
Ahmed, Khan *v.* - - - 149
Amos, Scene Estate Ltd. *v.* - 205
Anglo-Saxon Petroleum Co. Ltd. *v.* Adamastos Shipping Co. Ltd. - - - 233
Architects Registration Council of the United Kingdom, Hughes *v.* - - - - 550
Armstrong *v.* Clark - - 391
Attorney-General *v.* P. Y. A. Quarries Ltd. - - - 169
Attorney-General, *Ex parte*. Regina *v.* Griffiths - - 192

B

Behrens *v.* Bertram Mills Circus Ltd. - - - 1
Bertram Mills Circus Ltd., Behrens *v.* - - - 1
Beynon, Regina *v.* - - 111
Boyd *v.* Wilton - - - 277
B.P. Refinery (Kent) Ltd. *v.* Walker (Valuation Officer) 305
British Oil & Cake Mills Ltd., Compania Naviera Azuero S.A. *v.* - - - - 293
Brown, Jenkinson & Co. Ltd. *v.* Percy Dalton (London) Ltd. - - - - - 621

PAGE

Burpitt, *Ex parte*. Regina *v.* Medical Appeal Tribunal at London - - - - 584
Burton, Villa D'Este Restaurant Ltd. *v.* - - - 214

C

Cambridge County Council, Chivers & Sons Ltd. *v.* - 68
Cambridge County Council, Trustees of the National Institute of Agricultural Botany Registered *v.* - 68
Charter *v.* Sullivan - - 117
Chivers & Sons Ltd. *v.* Cambridge County Council - 68
Citati, Universal Cargo Carriers Corporation *v.* - - 401
Clark, Armstrong *v.* - - 391
Compania Naviera Azuero S.A. *v.* British Oil & Cake Mills Ltd. - - - - 293
Crabbe, Addiscombe Garden Estates Ltd. *v.* - - - 615
Craske, Regina *v.* *Ex parte* Metropolitan Police Commissioner - - - - 591
Critchell *v.* Lambeth Borough Council - - - - 535
Croydon Corporation, Receiver for the Metropolitan Police District *v.* - - 154
Cunningham, Regina *v.* - - 396

D

Davie *v.* New Merton Board Mills Ltd. - - - - 368

PAGE

E

Eastern Distributors Ltd. *v.* Goldring. Murphy, Third Party - - - - - 600
Edmonton Corporation, Norris *v.* - - - - - 564

F

Francis *v.* Yiewsley and West Drayton Urban District Council - - - - 136

G

Ghey and Galton's Application, *In re* - - - - 650
Goldring, Eastern Distributors Ltd. *v.* Murphy, Third Party - - - - 600
Griffiths, Regina *v.* *Ex parte* Attorney-General - - 192

H

Hall *v.* Meyrick - - - 455
Harris, Treasury *v.* - - 516
Hudson *v.* Ridge Manufacturing Co. Ltd. - - - 348
Hughes *v.* Architects Registration Council of the United Kingdom - - 550

I

Imperial Tobacco Co. (of Great Britain and Ireland) Ltd., Kelsen *v.* - - - 334
Income Tax Special Commissioners, Regina *v.* *Ex parte* Linsleys (Established 1894) Ltd. - - - - - 78
Industrial Disputes Tribunal, Regina *v.* *Ex parte* Queen Mary College, University of London - - - - 483

J

Jacobs, London Hospital Governors *v.* (No. 2) - - 528
Jones *v.* National Coal Board 55
Judge Dutton Briant, Regina *v.* *Ex parte* Abbey National Building Society - 497

K

Kelsen *v.* Imperial Tobacco Co. (of Great Britain and Ireland) Ltd. - - - 334
Khan *v.* Ahmed - - - 149

L

Lambeth Borough Council, Critchell *v.* - - - 535
Linsleys (Established 1894) Ltd. Regina *v.* Income Tax Special Commissioners - 78
Logan, Regina *v.* - - - 589
London Hospital Governors *v.* Jacobs (No. 2) - - - 528

M

Marlow (Bucks) Justices, Regina *v.* *Ex parte* Schiller 508
Medical Appeal Tribunal at London, Regina *v.* *Ex parte* Burpitt - - - 584
Melias Ltd. *v.* Preston - - 380
Metliss *v.* National Bank of Greece and Athens S.A. - 33
Metropolitan Police Commissioner, *Ex parte*. Regina *v.* Craske - - - - 591
Meyrick, Hall *v.* - - - 455
Monmouthshire County Council *v.* Smith - - - 154
Murphy, Third Party. Eastern Distributors Ltd. *v.* Goldring - - - - - 600

N

National Bank of Greece and Athens S.A., Metliss *v.* - 33
National Coal Board, Jones *v.* 55
National Deposit Friendly Society Trustees *v.* Skegness Urban District Council 573
New Merton Board Mills Ltd., Davie *v.* - - - 368
Norris *v.* Edmonton Corporation - - - - 564

PAGE

P

Percy Dalton (London) Ltd., Brown, Jenkinson & Co. Ltd. *v.* 621
Perfect, Regina *v.* 107
Post Office, Triefus & Co. Ltd. *v.* 352
Preston, Melias Ltd. *v.* 380
P. Y. A. Quarries Ltd., Attorney-General *v.* 169

Q

Queen Mary College, University of London, *Ex parte*. Regina *v.* Industrial Disputes Tribunal 483

R

Receiver for the Metropolitan Police District *v.* Croydon Corporation 154
Regina *v.* Beynon 111
Regina *v.* Craske. *Ex parte* Metropolitan Police Commissioner 591
Regina *v.* Cunningham 396
Regina *v.* Griffiths. *Ex parte* Attorney-General 192
Regina *v.* Income Tax Special Commissioners. *Ex parte* Linsleys (Established 1894) Ltd. 78
Regina *v.* Industrial Disputes Tribunal. *Ex parte* Queen Mary College, University of London 483
Regina *v.* Judge Dutton Briant. *Ex parte* Abbey National Building Society 497
Regina *v.* Logan 589
Regina *v.* Marlow (Bucks) Justices. *Ex parte* Schiller 508
Regina *v.* Medical Appeal Tribunal at London. *Ex parte* Burpitt 584
Regina *v.* Perfect 107

PAGE

Regina *v.* Vickers 664
Ridge Manufacturing Co. Ltd., Hudson *v.* 348

S

Scene Estate Ltd. *v.* Amos 205
Schiller, *Ex parte*. Regina *v.* Marlow (Bucks) Justices 508
Skegness Urban District Council, National Deposit Friendly Society Trustees *v.* 573
Smith, Monmouthshire County Council *v.* 154
Sullivan, Charter *v.* 117

T

Treasury *v.* Harris 516
Triefus & Co. Ltd. *v.* Post Office 352
Trustees of the National Institute of Agricultural Botany Registered *v.* Cambridge County Council 68

U

Universal Cargo Carriers Corporation *v.* Citati 401

V

Vickers, Regina *v.* 664
Villa D'Este Restaurant Ltd. *v.* Burton 214

W

Walker (Valuation Officer), B.P. Refinery (Kent) Ltd. *v.* 305
Wilton, Boyd *v.* 277

Y

Yiewsley and West Drayton Urban District Council, Francis *v.* 136

TABLE OF CASES CITED AND JUDICIALLY NOTICED

ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

			PAGE
Agra Bank, *In re*	L.R. 5 Eq. 160	*R.*	442
Aktieselskabet Ocean *v.* B. Harding & Sons Ltd.	[1928] 2 K.B. 371; 30 Ll.L.Rep. 249; 33 Com.Cas. 277		261
Aktieselskabet Reidar *v.* Arcos Ltd.	[1927] 1 K.B. 352; 42 T.L.R. 737		413
Alexander *v.* Rayson	[1936] 1 K.B. 169; 52 T.L.R. 131	*R.*	639–641
Allender *v.* Royal College of Veterinary Surgeons	[1951] W.N. 527; [1951] 2 T.L.R. 872; [1951] 2 All E.R. 859	*Appl.*	550, 558
Allinson *v.* General Council of Medical Education and Registration	[1894] 1 Q.B. 750; 10 T.L.R. 304	*Dist.*	550, 558, 560
Alvion Steamship Corporation Panama *v.* Galban Lobo Trading Co. S.A. of Havana	[1955] 1 Q.B. 430; [1955] 1 All E.R. 457	*C.*	293, 301, 302
André et Cie. S.A. *v.* J. H. Vantol Ltd.	[1952] 2 Lloyd's Rep. 282		458
Andrew Millar & Co. Ltd. *v.* Taylor & Co. Ltd.	[1916] 1 K.B. 402; 32 T.L.R. 161		419
Ardan S.S. Co. *v.* Weir	[1905] A.C. 501; 21 T.L.R. 723		415
Arneil *v.* Paterson	1931 S.C.(H.L.) 117		9
Attorney-General *v.* Bastow	[1957] 1 Q.B. 514; [1957] 1 All E.R. 497		19
Attorney-General *v.* Cole & Son	[1901] 1 Ch. 205	*F.*	170, 184
Attorney-General *v.* Corke	[1933] Ch. 89; 48 T.L.R. 650	*F.*	170, 184
Attorney-General *v.* Garner	[1907] 2 K.B. 480		172
Attorney-General *v.* Great Eastern Railway Co.	11 Ch.D. 449		172
Attorney-General *v.* Keymer Brick and Tile Co. Ltd.	67 J.P. 434	*F.*	170, 183
Attorney-General *v.* Plymouth Fish Guano and Oils Co.	76 J.P. 19		173
Attorney-General *v.* Seccombe	[1911] 2 K.B. 688	*R.*	582
Attorney-General *v.* Sheffield Gas Consumers Co.	3 De G.M. & G. 304	*R.*	182
Attorney-General *v.* Shrewsbury (Kingsland) Bridge Co.	21 Ch.D. 752		172
Attorney-General *v.* Stone	12 T.L.R. 76	*F.*	170, 184
Attorney-General for New South Wales *v.* Perpetual Trustee Co. (Ltd.)	[1955] A.C. 457; [1955] 1 All E.R. 846		10
Attorney-General for New South Wales *v.* Perpetual Trustee Co. Ltd.	92 C.L.R. 113; [1955] A.C. 457; [1955] 1 All E.R. 846	*Appl.*	155, 162
Bailey *v.* Potteries Electric Traction Co. Ltd.	[1931] 1 K.B. 385; 46 T.L.R. 601	*Appl.*	69, 74, 75
Bainbridge *v.* The Postmaster-General	[1906] 1 K.B. 178; 22 T.L.R. 70		356
Baker *v.* Snell	[1908] 2 K.B. 825; 24 T.L.R. 811	*Appl.*	3, 21–25, 32
Balfour *v.* Barty-King	[1957] 2 W.L.R. 84; [1957] 1 All E.R. 156		12

Bank of England *v.* Cutler	[1908] 2 K.B. 208		602
Bank Line Ltd. *v.* Arthur Capel & Co.	[1919] A.C. 435; 35 T.L.R. 150	*R.*	439, 447–449
Barker *v.* M'Andrew	18 C.B.N.S. 759		242
Baroness Wenlock *v.* River Dee Company	36 Ch.D. 674, 685n.; 3 T.L.R. 814	*R.*	52
Barrow Green Estate Co. *v.* Executors of Walker	[1954] 1 W.L.R. 231; [1954] 1 All E.R. 204		282
Barron (Inspector of Taxes) *v.* Littman	[1951] 1 All E.R. 70; [1951] Ch. 993; [1951] 2 T.L.R. 323; [1951] 2 All E.R. 393; 33 T.C. 373; [1953] A.C. 96; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548		88
Baxters and Midland Railway Co., *In re* an arbitration between	95 L.T. 20		419
Beavan *v.* Lord Hastings	2 K. & J. 724	*R.*	49, 53
Ben Line Steamers Ltd. *v.* Heureux (London) Ltd.	52 Ll.L.Rep. 27		627
Benmax *v.* Austin Motor Co. Ltd.	[1955] A.C. 370		72
Bennetts & Co. *v.* Brown	[1908] 1 K.B. 490; 24 T.L.R. 199; 13 Com.Cas. 110	*R.*	297, 298
Berg *v.* Sadler and Moore	[1937] 2 K.B. 158; 53 T.L.R. 430; [1937] 1 All E.R. 637	*R.*	641
Bergerem *v.* Marsh	6 B. & C.R. 195	*R.*	54
Besozzi *v.* Harris	1 F. & F. 92	*R.*	18
Best *v.* Samuel Fox & Co. Ltd.	[1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394		10
Black *v.* Christchurch Finance Co. Ltd.	[1894] A.C. 48		12
Bolton *v.* Stone	[1951] A.C. 850; [1951] 1 All E.R. 1078		173
Bottomley *v.* F. W. Woolworth & Co. Ltd.	[1952] W.N. 115; 48 T.L.R. 521		197
Bourne *v.* Keane	[1919] A.C. 815; 35 T.L.R. 560	*Appl.*	352, 360
Bowater *v.* Rowley Regis Corporation	[1944] K.B. 476; 60 T.L.R. 356; [1944] 1 All E.R. 465		11
Bowness *v.* O'Dwyer	[1948] 2 K.B. 219; 64 T.L.R. 367; [1948] 2 All E.R. 181	*R.*	222
Box *v.* Jubb	4 Ex.D. 76		12
Boyson *v.* Coles	6 M. & S. 14	*R.*	610
Bracegirdle *v.* Oxley	[1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126	*R.*	77, 78
Bracegirdle *v.* Oxley, Bracegirdle *v.* Cobley	[1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126	*R.*	328
Braithwaite *v.* Foreign Hardwood Co.	[1905] 2 K.B. 543; 21 T.L.R. 413	*R.*	445

Brandt *v.* Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.	[1924] 1 K.B. 575	*R.*	630, 634
Brankelow Steamship Co. *v.* Lamport & Holt	[1897] 1 Q.B. 570; 2 Com.Cas. 89; 66 L.J.Q.B. 382	*R.*	297
British and Beningtons Ltd. *v.* N. W. Cachar Tea Co. Ltd.	[1923] A.C. 48, 71; 8 Ll.L.Rep. 220; 10 Ll.L. Rep. 381	*Appl.*	404, 443–446
British Launderers' Research Association *v.* Borough of Hendon Rating Authority	[1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21	Dictum *C.*	69, 77
British Launderers' Research Association *v.* Hendon Borough Rating Authority	[1949] 1 K.B. 434, 462; 65 T.L.R. 103; [1949] 1 All E.R. 21	*R.*	328
British Launderers' Research Association *v.* Borough of Hendon Rating Authority	[1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21		579
British Portland Cement Manufacturers Ltd. *v.* Thurrock Urban District Council	114 J.P. 580; 66 T.L.R. (Pt. 2) 1003	*R.*	319, 328
British Stamp and Ticket Automatic Delivery Co. Ltd. *v.* Haynes	[1921] 1 K.B. 377		121
British Transport Commission *v.* Gourley	[1956] A.C. 185; [1955] 3 All E.R. 796	*R.*	161, 162, 164, 165
British Westinghouse Electric and Manufacturing Co. Ltd. *v.* Underground Electric Railways Company of London Ltd.	[1912] A.C. 673		121
Brook's Wharf and Bull Wharf Ltd. *v.* Goodman Bros.	[1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696	*C.*	155, 163, 166, 167
Brown *v.* Buck	[1934] 4 D.L.R. 446		120
Bruce *v.* Nicolopulo	11 Ex. 129		261
Burgess *v.* Florence Nightingale Hospital for Gentlewomen	[1955] 1 Q.B. 349; [1955] 1 All E.R. 511	*Dist.*	3, 29
Burnett Steamship Co. Ltd. *v.* Danube and Black Sea Shipping Agencies	[1933] 2 K.B. 438; 49 T.L.R. 553	*Appl.*	293, 299, 302, 304
Burrows *v.* Rhodes	[1899] 1 Q.B. 816		628
Burton (V.O.) *v.* Ogdens (Brighton) Ltd.	23 D.R.A. 246	*C.*	306, 319, 328, 332
Cababé *v.* Walton-on-Thames Urban District Council	[1914] A.C. 102	*R.*	74
Cameron *v.* Campbell & Worthington Ltd.	[1930] S.A.S.R. 402		120
Cardiff Rating Authority and Cardiff Assessment Committee *v.* Guest Keen Baldwin's Iron and Steel Co. Ltd.	[1949] 1 K.B. 385; 65 T.L.R. 159; [1949] 1 All E.R. 27	*C.*	306, 317, 318, 319, 324, 325, 328, 332
Carr *v.* Mercantile Produce Co. Ltd.	[1949] 2 K.B. 601; 65 T.L.R. 503; [1949] 2 All E.R. 531		60
Caulfield *v.* P. W. Pickup Ltd.	[1941] 2 All E.R. 510		60
Chandris *v.* Isbrandtsen-Moller Co. Inc.	[1951] 1 K.B. 240		243

Chandris *v.* Isbrandtsen-Moller Co.	[1951] 1 K.B. 240; 66 T.L.R. (Pt. 1) 971; [1950] 1 All E.R. 768	*Appl.*	403, 430
Chaplin *v.* Hicks	[1911] 2 K.B. 786; 27 T.L.R. 458	*R.*	469
Charrington & Co. Ltd. *v.* Wooder	[1914] A.C. 71; 30 T.L.R. 176		120
Chatsworth Estate Co. *v.* Fewell	[1931] 1 Ch. 224		654
Christel Vinnen, The	[1924] P. 208; 40 T.L.R. 845		260
Cilia *v.* H. M. James & Sons	[1954] 1 W.L.R. 721; [1954] 2 All E.R. 9	*R.*	376
Clark *v.* Williard	292 U.S. 112; 294 U.S. 211	*R.*	45, 46
Clayards *v.* Dethick and Davis	12 Q.B. 439	*F.*	3, 20, 21
Clegg, Parkinson & Co. *v.* Earby Gas Co.	[1896] 1 Q.B. 592; 12 T.L.R. 241		357
Clifton *v.* Viscount Bury	4 T.L.R. 8	*R.*	344
Clipsham *v.* Vertue	5 Q.B. 265	*R.*	431, 432, 435
Cockerline (W. H.) & Co. *v.* Inland Revenue Commissioners	47 T.L.R. 13; 16 T.C. 1		82, 104
Commissioners of Inland Revenue *v.* Forrest	15 App.Cas. 334; 6 T.L.R. 456	*R.*	583
Compania Naviera Vasconzada *v.* Churchill & Sim	[1906] 1 K.B. 237; 22 T.L.R. 85	*R.*	630, 634
Cowen *v.* Truefitt	[1899] 2 Ch. 309		243
Crofter Hand Woven Harris Tweed Co. Ltd. *v.* Veitch	[1942] A.C. 435; 58 T.L.R. 125; [1942] 1 All E.R. 142	*R.*	629, 644, 649
Dairy Supply Co. *v.* Houghton	106 L.T. 220; 28 T.L.R. 94	*R.*	74
Dampskibsselskabet Botnia A/S *v.* C. P. Bell & Co.	[1932] 2 K.B. 569; 48 T.L.R. 93; 41 Ll.L.Rep. 160	*R.*	298
Dann *v.* Hamilton	[1939] 1 K.B. 509; 55 T.L.R. 297; [1939] 1 All E.R. 59		11
Daubuz *v.* Lavington	13 Q.B.D. 347		499
Davidson *v.* Gwynne	12 East 381	*R.*	431
Davis (D.) & Sons Ltd. *v.* Pontypridd Union Assessment Committee	115 L.T. 259	*R.*	74
Dawson *v.* Linton	5 B. & Ald. 521		159
Day *v.* Trig	1 P.Wms. 286		244
De Nicols *v.* Curlier	[1900] A.C. 21; 16 T.L.R. 101		39
Dent *v.* Glen Line Ltd.	45 Com.Cas. 244	*R.*	636, 645
Derbyshire Miners' Welfare Committee *v.* Skegness U. D. C.	[1957] 1 W.L.R. 764; [1957] 2 All E.R. 405		579
Dimech *v.* Corlett	12 Moo.P.C. 199		421
Donnelly *v.* Glasgow Corporation	1953 S.L.T. 161	*Appl.*	369, 375, 376, 378
Donoghue *v.* Stevenson	[1932] A.C. 562; 48 T.L.R. 494	*R.*	14
Donoghue *v.* Stevenson	[1932] A.C. 562; 48 T.L.R. 494	*C.*	369, 379
Downs *v.* Cooper	2 Q.B. 256	*R.*	607
Driscoll *v.* Church Commissioners for England	[1957] 1 Q.B. 330; [1956] 3 All E.R. 802	*R.*	660
Dulaney *v.* Merry & Sons	[1901] 1 Q.B. 536; 17 T.L.R. 253	*R.*	49
Dulieu *v.* White & Sons	[1901] 2 K.B. 669; 17 T.L.R. 555		11

Dunkirk Colliery Co. *v.* Lever	9 Ch.D. 20	*C.*	117, 126, 127, 128
Dunne *v.* Byrne	[1912] A.C. 407; 28 T.L.R. 257		579
East Riding County Council *v.* Park Estate (Bridlington) Ltd.	[1957] A.C. 223; [1956] 2 All E.R. 669	*Appl.*	137, 143, 144, 145
East Riding County Council *v.* Park Estate (Bridlington) Ltd.	[1957] A.C. 223; [1956] 2 All E.R. 669	*Appl.*	565, 568–572
Edwards *v.* Bairstow	[1956] A.C. 14; [1955] 3 All E.R. 48	*R.*	328
Edwards *v.* National Coal Board	[1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743		60
Embiricos *v.* Sydney Reid & Co.	[1914] 3 K.B. 45	*R.*	439, 448, 449
Emmens *v.* Pottle	16 Q.B.D. 354; 2 T.L.R. 115	*Dist.*	193, 203, 204
Enoch and Zaretzky Bock & Co., *In re*	[1910] 1 K.B. 327	*R.*	64
Etablissements Chainbaux S.A.R.L. *v.* Harbormaster Ltd.	[1955] 1 Lloyd's Rep. 303	*R.*	448
Evera S.A. Commercial *v.* North Shipping Co. Ltd.	[1956] 2 Lloyd's Rep. 367		413
F. P. H. Finance Trust Ltd. (in liquidation) *v.* Inland Revenue Commissioners	[1944] A.C. 285; 60 T.L.R. 450; [1944] 1 All E.R. 653; 26 T.C. 131	*R.*	106, 107
Facchini *v.* Bryson	[1952] 1 T.L.R. 1386	*R.*	619
Filburn *v.* People's Palace and Aquarium Co. Ltd.	25 Q.B.D. 258; 6 T.L.R. 402	*F.*	2, 15, 18, 30
Fishwick *v.* Gyani	[1925] 1 K.B. 617; 41 T.L.R. 253		511
Fleeming *v.* Orr	2 Macq. 14		9
Folkestone Corporation *v.* Brockman	[1914] A.C. 338		71
Forslind *v.* Bechely-Crundall	1922 S.C.(H.L.) 173	*C.*	404, 436, 439, 440
Four-Maids Ltd. *v.* Dudley Marshall (Properties) Ltd.	[1957] Ch. 317; [1957] 2 All E.R. 35	*R.*	507
Frampton *v.* Gillison	[1927] 1 Ch. 196; 42 T.L.R. 749		356
Francis *v.* Yiewsley and West Drayton U. D. C.	[1957] 2 Q.B. 136; [1957] 1 All E.R. 825		567
Freeman *v.* Taylor	8 Bing. 124	*R.*	431
Freeth *v.* Burr	L.R. 9 C.P. 208		411
Fuentes *v.* Montis	L.R. 3 C.P. 268	*R.*	608, 609
Gebhardt *v.* Saunders	[1892] 2 Q.B. 452	*R.*	168
Geipel *v.* Smith	L.R. 7 Q.B. 404	*C.*	403, 404, 434, 447
General Medical Council *v.* Spackman	[1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 33		554
General Nursing Council *v.* Marylebone Corporation	[1957] 2 All E.R. 791		579
Giersten *v.* George V. Turnbull & Co.	1908 S.C. 1101	*R.*	265
Gifford *v.* Dent	[1926] W.N. 336	*Appl.*	335, 341, 345
Gilmour *v.* Coats	[1949] A.C. 427; 65 T.L.R. 234; [1949] 1 All E.R. 848		579
Glasbrook Brothers Ltd. *v.* Glamorgan County Council	[1925] A.C. 270; 41 T.L.R. 213		357

Glasgow Corporation *v.* Muir	[1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44	*R.*	18
Godfrey *v.* Lazarus	4 T.L.R. 101		500
Golodetz *v.* Kersten, Hunik & Co.	24 Ll.L.Rep. 374		257
Goodson *v.* Richardson	L.R. 9 Ch. 221	*R.*	347
Grace (G. W.) & Co. *v.* General Steam Navigation Co.	[1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201	*R.*	449
Graham *v.* Public Works Commissioners	[1901] 2 K.B. 781; 17 T.L.R. 540		356
Grant *v.* Australian Knitting Mills	[1936] A.C. 85; 52 T.L.R. 38	*C.*	369, 379
Grant *v.* Coverdale	9 App.Cas. 470		428
Griffiths *v.* Evans	[1953] 1 W.L.R. 1424; [1953] 2 All E.R. 1364	*Dist.*	456, 467
Groom *v.* Crocker	[1939] 1 K.B. 194; 54 T.L.R. 861; [1938] 2 All E.R. 394	*Appl.*	456, 468, 477
Gulliver *v.* Catt	[1952] 2 Q.B. 308; [1952] 1 T.L.R. 956; [1952] 1 All E.R. 929		282
Hadwell *v.* Righton	[1907] 2 K.B. 345; 23 T.L.R. 548		8
Hadley *v.* Baxendale	9 Ex. 341	*Appl.*	456, 468–471
Hale *v.* Jennings Bros.	[1938] 1 All E.R. 579	*R.*	22
Hall *v.* Hollander	5 B. & C. 660		159
Halley, The	L.R. 2 P.C. 193	*R.*	48, 50
Hambrook *v.* Stokes Bros.	[1925] 1 K.B. 141; 41 T.L.R. 125		11
Hamilton & Co. *v.* Mackie & Sons	5 T.L.R. 677	*R.*	249, 250
Harold Wood Brick Co. Ltd. *v.* Ferris	[1935] 2 K.B. 198		413
Harris *v.* Brights Asphalt Contractors Ltd.	[1953] 1 Q.B. 617; [1953] 1 All E.R. 395		371
Harris *v.* Harris	The Times, 1952, April 9; Judgments of the Ct. of Appeal, 1952, No. 148	*R.*	64
Hart *v.* Hudson Bros. Ltd.	[1928] 2 K.B. 629; 44 T.L.R. 820		384
Haseldine *v.* Daw (C. A.) & Son Ltd.	[1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156		372
Hay (or Bourhill) *v.* Young	[1943] A.C. 92; [1942] 2 All E.R. 396		13
Heath's Garage Ltd. *v.* Hodges	[1916] 2 K.B. 370; 32 T.L.R. 570	*R.*	30
Henderson's Conveyance, *In re*	[1940] Ch. 835; 56 T.L.R. 952; [1940] 4 All E.R. 1	*Appl.*	651, 658, 659, 663
Heyman *v.* Darwins Ltd.	[1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337	*Appl.*	403, 436, 441

Hickton *v.* Hodgson	110 L.T. 380; 30 T.L.R. 221; 78 J.P. 93	*Appl.*	69, 74, 75
Hillas (W. N.) & Co. Ltd. *v.* Arcos Ltd.	38 Com.Cas. 28; 43 Ll.L.Rep. 359		241
Hills (Patents) Ltd. *v.* University College Hospital Board of Governors	[1956] 1 Q.B. 90; [1955] 3 All E.R. 365	*C.*	616, 620
Hinckley and Country Building Society *v.* Henny	[1953] 1 W.L.R. 352; [1953] 1 All E.R. 515	*R.*	505, 507
Hirachand Punamchand *v.* Temple	[1911] 2 K.B. 330; 27 T.L.R. 430		522
H.M. Treasury *v.* Harris	[1957] 2 Q.B. 516; [1957] 2 All E.R. 455		511
Hobourn Aero Components Ltd.'s Air Raid Distress Fund, *In re*	[1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501		579
Hochster *v.* De la Tour	2 E. & B. 678	*R.*	436, 437
Hodgson *v.* British Arc Welding Co. Ltd.	[1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95	*R.*	376
Hodgson *v.* Lakeman	[1943] K.B. 15		519
Holloway *v.* Egham Urban District Council	72 J.P. 433		71
Holman *v.* Johnson	1 Cowp. 341	*R.*	637, 642
Hotchin *v.* Hindmarsh	[1891] 2 Q.B. 181; 7 T.L.R. 513	*Appl.*	381, 387, 391
Hudson's Bay Company *v.* Domingo Mumbru Sociedad Anonima	10 Ll.L.Rep. 476	*R.*	452
Hulton (E.) & Co. *v.* Jones	[1910] A.C. 20; 26 T.L.R. 128		152
Imperial Smelting Corporation Ltd. *v.* Joseph Constantine Steamship Line Ltd.	[1940] 1 K.B. 812; 66 Ll.L.Rep. 147; [1940] 2 All E.R. 46; [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165	*E.*	235, 253, 254
Imperial Wine Co., *In re*; Shireff's Case	L.R. 14 Eq. 417		426
Inland Revenue Commissioners *v.* Baddeley	[1955] A.C. 572; [1955] 1 All E.R. 523	*R.*	581
Inland Revenue Commissioners *v.* Hambrook	[1956] 2 Q.B. 641; [1956] 3 All E.R. 338	*R.*	162
Inland Revenue Commissioners *v.* John Dow Stuart Ltd.	[1950] A.C. 149; [1950] 1 All E.R. 1; 31 T.C. 274	*Dist.*	79, 105
Inverkip Steamship Co. Ltd. *v.* Bunge & Co.	[1917] 2 K.B. 193	*Appl.*	403, 431, 432
Johnson *v.* Credit Lyonnais Company	3 C.P.D. 32	*R.*	610
Johnstone *v.* Milling	16 Q.B.D. 460; 2 T.L.R. 249		412
Jolly *v.* Arbuthnot	4 De G. & J. 224	*Appl.*	498, 505, 507
Jones, *Ex p.*	13 Ves. 237	*R.*	204
Jorden *v.* Money	5 H.L.C. 185	*R.*	343
Joseph Constantine Steamship Line Ltd. *v.* Imperial Smelting Corporation	[1942] A.C. 154; [1941] 2 All E.R. 165		256
Kahler *v.* Midland Bank	[1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621		602

Keats *v.* London County Council	[1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303	*R.*	143, 144
Keats *v.* London County Council	[1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303	*Q.*	565, 569, 571
Kent *v.* Conniff	[1953] 1 Q.B. 361; [1953] 1 All E.R. 155		282
Kenyon *v.* Hart	6 B. & S. 249	*R.*	344
Keys *v.* Harwood	2 C.B. 905	*R.*	441
King *v.* Phillips	[1953] 1 Q.B. 429; [1953] 1 All E.R. 617		13
Kleinwort, Sons & Co. *v.* Ungarische Baumwolle Industrie Aktiengesellschaft	[1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38	*Appl.*	34, 41
Knott *v.* London County Council	[1934] 1 K.B. 126; 50 T.L.R. 55	*R.*	17
Land Settlement Association *v.* Carr	[1944] 1 K.B. 657; 60 T.L.R. 488; [1944] 2 All E.R. 126	*R.*	212
Lane *v.* Cotton	1 Ld.Raym. 646	*Appr.*	353, 360–362, 367
Langston, *In the Estate of*	[1953] P. 100; [1953] 1 All E.R. 928		207
Lawrence *v.* Jenkins	L.R. 8 Q.B. 274		12
Lazard Brothers & Co. *v.* Midland Bank Ltd.	[1933] A.C. 289; 49 T.L.R. 94	*R.*	42
Lee *v.* Sheard	[1956] 1 Q.B. 192; [1955] 3 All E.R. 777		10
Leeds Shipping Co. Ltd. *v.* Duncan Fox & Co. Ltd.	42 Ll.L.Rep. 123; 37 Com.Cas. 213	*Dist.*	235, 271
Lee-on-Solent Railway Co. and Southern Railway Co., *In re*	[1923] 2 K.B. 771; 39 T.L.R. 620	*R.*	43
Lester *v.* Balfour Williamson Ltd.	[1953] 2 Q.B. 168; [1953] 1 All E.R. 1146		385
Lincolnshire (Parts of Lindsey) County Council *v.* Wallace Holiday Camp Ltd.	[1953] 2 Q.B. 178; [1953] 1 All E.R. 1143		141
Lloyd, *Ex p.*	Mont. 70	*R.*	63
London Association of Shipowners and Brokers *v.* London and India Docks Joint Committee	[1892] 3 Ch. 242; 8 T.L.R. 717		538
London Association of Shipowners and Brokers *v.* London and India Docks Joint Committee	[1892] 3 Ch. 242		553
London Graving Dock Co. Ltd. *v.* Horton	[1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1	*R.*	378
London Hospital Governors *v.* Jacobs	[1956] 1 W.L.R. 662; [1956] 2 All E.R. 603		531
London Hospital Governors *v.* Jacobs (No. 2)	[1957] 2 Q.B. 528	*Appl.*	535, 538, 544, 550
Lovelock *v.* Franklyn	8 Q.B. 371		426
Lowther *v.* Harris	[1927] 1 K.B. 393; 43 T.L.R. 24	*R.*	610, 611
MacAndrew *v.* Chapple	L.R. 1 C.P. 643	*R.*	431
M'Intyre *v.* Belcher	14 C.B.N.S. 654		426
McLeod *v.* St. Aubyn	[1899] A.C. 549; 15 T.L.R. 487	*Dist.*	193, 203

McQuaker *v.* Goddard	[1940] 1 K.B. 687; 56 T.L.R. 409; [1940] 1 All E.R. 471	*R.*	16
Malcolm *v.* Cheek	[1948] 1 K.B. 400; 64 T.L.R. 28; [1947] 2 All E.R. 881		384
Mallon *v.* W. H. Smith & Co. Ltd.	9 T.L.R. 621		197
Maple Flock Co. Ltd. *v.* Universal Furniture Products (Wembley) Ltd.	[1934] 1 K.B. 148; 50 T.L.R. 58		425
Maritime National Fish Ltd. *v.* Ocean Trawlers Ltd.	[1935] A.C. 524	*R.*	434
Marriott *v.* East Grinstead Gas and Water Co.	[1909] 1 Ch. 70; 25 T.L.R. 59		339
Marshall & Co. *v.* Nicoll & Son	1919 S.C.(H.L.) 129	*R.*	127
Marshall *v.* London Transport Executive	[1936] 3 All E.R. 83		474
Martin, *In re*, Loustalan *v.* Loustalan	[1900] P. 211; 16 T.L.R. 354	*R.*	53
Martin *v.* Coles	1 M. & S. 140	*R.*	610
Martyr *v.* Lawrence	2 De G.J. & S. 261	*R.*	340
Mason & Risch Ltd. *v.* Christner	48 O.L.R. 8; 54 D.L.R. 653		120
Mason *v.* Williams and Williams Ltd.	[1955] 1 W.L.R. 549; [1955] 1 All E.R. 808	*N.F.*	369, 373, 377, 378
Maung Kyow (Maney Kyaw) *v.* Ma Kyin	7 Burm.L.R. 73; 2 Upper Burma Rulings 570		8
Mead *v.* Chelmsford R. D. C.	[1953] 1 Q.B. 32		567
Mersey Steel and Iron Co. *v.* Naylor, Benzon & Co.	9 App.Cas. 434		411
Millar's Karri and Jarrah Co. (1902) *v.* Weddel, Turner & Co.	100 L.T. 128; 14 Com.Cas. 25		416
Minister of Food *v.* Reardon Smith Line Ltd.	[1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265	*Dist.*	235, 249, 271
Minister of Food *v.* Reardon Smith Line Ltd.	[1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265		419
Minister of Health *v.* The King	[1931] A.C. 494	*R.*	327
Minister of Materials *v.* Wold Steamship Co. Ltd.	[1952] 1 Lloyd's Rep. 485	*R.*	273
Mitchell *v.* Croydon Justices	111 L.T. 632; 30 T.L.R. 526	*Appl.*	69, 74, 75
Mitchell *v.* Rochester Railway Co.	151 N.Y. 107		11
Monck *v.* Hilton	2 Ex.D. 268		579
Monmouthshire County Council *v.* Smith	[1956] 1 W.L.R. 1132	*Aff.*	155
Moore *v.* Robinson	2 B. & Ad. 817		384
Moralice (London) Ltd. *v.* Man	[1954] 2 Lloyd's Rep. 526		627
Moule *v.* Garrett	L.R. 5 Ex. 132; L.R. 7 Ex. 101	*R.*	167
Moxham *v.* Grant	[1900] 1 Q.B. 88; 16 T.L.R. 34		159
Murray *v.* Harringay Arena Ltd.	[1951] 2 K.B. 529; [1951] 2 All E.R. 320n.		10
Nash *v.* Hollinshead	[1901] 1 K.B. 700; 17 T.L.R. 352		579
National Anti-Vivisection Society *v.* Inland Revenue Commissioners	[1948] A.C. 31; 63 T.L.R. 424; [1947] 2 All E.R. 217		580

National Deposit Friendly Society Trustees *v.* Skegness U. D. C.	[1957] 1 Q.B. 531; [1957] 1 All E.R. 407	*Aff.*	574
Nello Simoni *v.* A/S M/S Straum	83 Ll.L.Rep. 157		424
Nelson Line (Liverpool) Ltd. *v.* James Nelson & Sons Ltd.	[1908] A.C. 16; 24 T.L.R. 114	*R.*	272
New York and Cuba Mail Steamship Co. *v.* Eriksen and Christensen	27 Com.Cas. 330		259
New York Life Insurance Co. *v.* Styles	14 App.Cas. 381; 5 T.L.R. 621		579
Nicolene Ltd. *v.* Simmonds	[1953] 1 Q.B. 543; [1953] 1 All E.R. 822	*R.*	269
North River Freighters Ltd. *v.* H.E. President of India.	[1956] 1 Q.B. 333; [1956] 1 All E.R. 50	*R.*	428
North Western Cachar Tea Co. Ltd. *v.* British & Beningtons Ltd.	10 Ll.L.Rep. 381	*R.*	435, 444
Northwestern Utilities Ltd. *v.* London Guarantee and Accident Co. Ltd.	[1936] A.C. 108; 52 T.L.R. 93		12
Nottage, *In re*	[1895] 2 Ch. 649; 11 T.L.R. 519		580
Omnium d'Enterprises *v.* Sutherland	[1919] 1 K.B. 618		426
Oppenheim *v.* Tobacco Securities Trust Co. Ltd.	[1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31		579
Otter *v.* Church, Adams, Tatham & Co.	[1953] Ch. 280; [1953] 1 All E.R. 168	*R.*	470, 471
Owens *v.* Liverpool Corporation	[1939] 1 K.B. 394; 55 T.L.R. 246; [1938] 4 All E.R. 727	*R.*	28
Paine *v.* Colne Valley Electric Supply Co. Ltd.	55 T.L.R. 181; [1938] 4 All E.R. 803	*Appl.*	369, 375
Parker *v.* Oloxo Ltd.	[1937] 3 All E.R. 524	*R.*	18
Pearce *v.* Brooks	L.R. 1 Ex. 213	*R.*	641
Pearks, Gunston & Tee Ltd. *v.* Ward	[1902] 2 K.B. 1; 18 T.L.R. 538	*R.*	386
Perrins *v.* Perrins	[1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075	*Dist.*	138, 147
Perrins *v.* Perrins	[1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075	*Appl.*	565, 570–572
Petrofina S.A. of Brussels *v.* Compagnia Italiana Trasporto Olii Minerali of Genoa	53 T.L.R. 650; 57 Ll.L.Rep. 247; 42 Com.Cas. 286	*Appl.*	235, 253, 269, 272
Phoenix Bessemer Steel Co., *In re*	4 Ch.D. 108	*R.*	442, 443
Pickering *v.* Busk	15 East 37	*R.*	607, 608
Pickering *v.* Rudd	4 Camp. 219	*N.F.*	335, 343, 345
Pilkington *v.* Wood	[1953] Ch. 770; [1953] 2 All E.R. 810		458
Polsky *v.* S. & A. Services Ltd.	[1951] W.N. 256; [1951] 1 All E.R. 1062n.; affirming [1951] 1 All E.R. 185		603

Postill *v.* East Riding County Council	[1956] 2 Q.B. 386; [1956] 2 All E.R. 685		140
Pownal *v.* Ferrand	6 B. & C. 439		159
Printing and Numerical Registering Co. *v.* Sampson	L.R. 19 Eq. 462		627
Produce Brokers Co. *v.* Weiss & Co.	87 L.J.Q.B. 472		424
Rands *v.* McNeil	[1955] 1 Q.B. 253; [1954] 3 All E.R. 593		12
Read *v.* Croydon Corporation	55 T.L.R. 212; [1938] 4 All E.R. 631		357
Read *v.* J. Lyons & Co. Ltd.	[1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471	*Appl.*	3, 14, 16, 19, 21
Read *v.* J. Lyons & Co. Ltd.	[1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471	*R.*	192
Reardon Smith Line Ltd. *v.* Australian Wheat Board	[1956] A.C. 266; [1956] 1 All E.R. 456	*R.*	21
Receiver for the Metropolitan Police District *v.* Croydon Corporation	[1956] 1 W.L.R. 1113	*Rev.*	155
Reg. *v.* Architects' Registration Tribunal, *Ex p.* Jagger	61 T.L.R. 445; [1945] 2 All E.R. 131		552
Reg. *v.* Berry	1 Q.B.D. 447	*R.*	115
Reg. *v.* Bryan	[1954] 3 D.L.R. 631		195
Reg. *v.* Clewer	37 Cr.App.R. 37	*R.*	64
Reg. *v.* Faulkner	13 Cox C.C. 550	*R.*	399
Reg. *v.* Garland	5 Cox C.C. 165		173
Reg. *v.* Industrial Disputes Tribunal, *Ex p.* Derbyshire County Council	June 11, 1952. Unreported		489
Reg. *v.* Industrial Disputes Tribunal, *Ex p.* Practical Banking Ltd.	[1952] 2 Q.B. 662; [1952] 1 T.L.R. 1448; [1952] 1 All E.R. 1370		488
Reg. *v.* Judge Willes, *Ex p.* Abbey National Building Society	[1954] 1 W.L.R. 136		499
Reg. *v.* Kerswill	[1895] 1 Q.B. 1; 11 T.L.R. 8		511
Reg. *v.* Latimer	17 Q.B.D. 359; 2 T.L.R. 626; 55 L.J.M.C. 135	*R.*	399
Reg. *v.* Martin	8 Q.B.D. 54; 14 Cox C.C. 633	*R.*	398, 399
Reg. *v.* Master	L.R. 4 Q.B. 285		511
Reg. *v.* Medical Appeal Tribunal, *Ex p.* Gilmore	[1957] 1 Q.B. 574; [1957] 1 All E.R. 796		586
Reg. *v.* Mutters	Leigh & Cave 491		173
Reg. *v.* Odhams Press Ltd.	[1957] 1 Q.B. 73; [1956] 2 All E.R. 494	*R.*	195, 204
Reg. *v.* Pembliton	L.R. 2 C.C.R. 119	*Appl.*	397, 399, 400
Reg. *v.* Petrie	4 E. & B. 737		71
Reg. *v.* Price	12 Q.B.D. 247	*R.*	183
Reg. *v.* Roberts	[1954] 2 Q.B. 329; [1953] 2 All E.R. 340	*N.F.*	112, 113, 115

Reg. *v.* Rogers	[1953] 1 Q.B. 311; [1953] 1 All E.R. 206; 36 Cr.App. R. 203	*Appl.*	108, 111
Reg. *v.* Rowe	[1955] 1 Q.B. 573; [1955] 2 All E.R. 234		519
Reg. *v.* Serné	16 Cox C.C. 311		668
Reg. *v.* Whitmarsh	5 Q.B. 600	*Dist.*	574, 580
Reid *v.* Dawson	[1955] 1 Q.B. 214; [1954] 3 All E.R. 498	*C.*	206, 208, 212
Renton (G. H.) & Co. *v.* Palmyra Trading Corporation of Panama	[1957] A.C. 149; [1956] 3 All E.R. 957	*C.*	235, 253
Reuter, Hufeland & Co. *v.* Sala & Co.	4 C.P.D. 239		418
Rex *v.* Bateman	31 Cr.App.R. 106	*R.*	64
Rex *v.* Brook	[1949] 2 K.B. 138; 65 T.L.R. 273; [1949] 1 All E.R. 787	*R.*	524, 526
Rex *v.* Byers	71 J.P. 205		173
Rex *v.* Cain	25 Cr.App.R. 204	*R.*	64
Rex *v.* Dashwood	[1943] K.B. 1; [1942] 2 All E.R. 586	*R.*	114
Rex *v.* Dyson	7 C. & P. 305n.		113
Rex *v.* Fulham, Hammersmith and Kensington Rent Tribunal, *Ex p.* Gormly	[1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030		216
Rex *v.* General Council of Medical Education and Registration	[1930] 1 K.B. 562; 46 T.L.R. 197	*Dist.*	551, 558
Rex *v.* Harris	[1951] 1 K.B. 107; 66 T.L.R. (Pt. 2) 739; [1950] 2 All E.R. 816	*R.*	110
Rex *v.* Hutchinson	[1936] W.N. 271; [1936] 2 All E.R. 1514		195
Rex *v.* Industrial Disputes Tribunal, *Ex p.* Banstead U.D.C.	Jan. 29, 1952. Unreported	*R.*	494
Rex *v.* Lloyd	4 Esp. 200	*R.*	182, 191
Rex *v.* National Arbitration Tribunal, *Ex p.* South Shields Corporation	[1952] 1 K.B. 46; [1951] 2 T.L.R. 791; [1951] 2 All E.R. 828	*Dist.*	484, 493–495
Rex *v.* Pritchard	7 C. & P. 303		113
Rex *v.* Rivett	34 Cr.App.R. 87	*R.*	114, 115
Rex *v.* Shackell	M'Cl. & Y. 514		522
Rex *v.* Special Commissioners of Income Tax, *Ex p.* Shaftesbury Homes and Arethusa Training Ship	[1922] 2 K.B. 729	*R.*	582
Rex *v.* Stobbart	[1951] 2 T.L.R. 823; [1951] 2 All E.R. 753	*R.*	110
Rex *v.* White and Ward	1 Burr. 333	*R.*	182
Rex *v.* Woolf	2 B. & Ald. 609	*Appl.*	516, 524
Rhodes, *In re*	44 Ch.D. 94		159
Richardson *v.* Mellish	2 Bing. 229	*R.*	469
Richard Thomas & Co. Ltd. *v.* Monmouth County Valuation Committee, etc.	60 T.L.R. 298; [1944] 1 All E.R. 417	*Appl.*	305, 315, 327, 333
Rickards *v.* Lothian	[1913] A.C. 263; 29 T.L.R. 281		12

Roach *v.* Garvan (St. James' Evening Post)	2 Atk. 469	*R.*	204
Robertson *v.* Cilia	[1956] 1 W.L.R. 1502; [1956] 3 All E.R. 651		501
Rogers *v.* Price	3 Y. & J. 28		159
Roper *v.* Public Works Commissioners	[1915] 1 K.B. 45		356
Rothes (Countess) *v.* Kirkcaldy Waterworks Commissioners	7 App.Cas. 694		357
Royal Greek Government *v.* Minister of Transport	83 Ll.L.Rep. 228		424
Russian and English Bank and Florence Montefiore Guedalla *v.* Baring Brothers & Co.	[1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505	*R.*	44
Rylands *v.* Fletcher	L.R. 3 H.L. 330	*R.*	21, 22
Rylands *v.* Fletcher	L.R. 3 H.L. 330	*R.*	192
St. John Shipping Corporation *v.* Joseph Rank Ltd.	[1957] 1 Q.B. 267; [1956] 3 All E.R. 683		628
Sapwell *v.* Bass	[1910] 2 K.B. 486; 26 T.L.R. 452	*R.*	469
Savona, The	[1900] P. 252	*R.*	439
Scott *v.* Brown, Doering, McNab & Co.	[1892] 2 Q.B. 724; 8 T.L.R. 755	*R.*	643
Serraino & Sons *v.* Campbell	[1891] 1 Q.B. 283; 7 T.L.R. 174		241
Shackell *v.* Rosier	2 Bing.N.C. 634	*R.*	629
Shaffer (James) Ltd. *v.* Findlay Durham & Brodie	[1953] 1 W.L.R. 106		412
Shelfer *v.* City of London Electric Lighting Co.	[1895] 1 Ch. 287; 11 T.L.R. 137	*R.*	345, 346
Shilvock *v.* Booth	[1956] 1 W.L.R. 135; [1956] 1 All E.R. 382		511
Silver *v.* Ocean Steamship Co. Ltd.	[1930] 1 K.B. 416; 46 T.L.R. 78	*Appl.*	622, 630, 634
Simm *v.* Anglo-American Telegraph Company	5 Q.B.D. 188	*R.*	606, 611
Smith *v.* Baker & Sons	[1891] A.C. 325; 7 T.L.R. 679		11
Smith *v.* Cook	1 Q.B.D. 79	*R.*	15
Smith *v.* Crossley Bros. Ltd.	95 S.J. 655	*Dist.*	348, 351
Smith *v.* Fox	6 Hare 386		474
Smith *v.* Ocean Steamship Co. Ltd.	[1954] 2 Lloyd's Rep. 482		349
Snia Societa di Navigazione Industria e Commercio *v.* Suzuki & Co.	29 Com.Cas. 284		422
Société Co-operative Suisse des Céréales et Matieres Fourragères *v.* La Plata Cereal Co. S.A.	80 Ll.L.Rep. 530		424
Soltau *v.* De Held	2 Sim.N.S. 133	*R.*	182
Southern Foundries (1926) Ltd. *v.* Shirlaw	[1940] A.C. 701; 56 T.L.R. 637; [1940] 2 All E.R. 445		412
Southport Corporation *v.* Esso Petroleum Co.	[1954] 2 Q.B. 182; [1954] 2 All E.R. 561	*R.*	192
South Wales Aluminium Co. Ltd. *v.* Assessment Committee for the Neath Assessment Area	[1943] 2 All E.R. 587	*R.*	308
Spokes *v.* Banbury Board of Health	L.R. 1 Eq. 42, 49		174

Stafford Allen & Sons Ltd. *v.* Pacific Steam Navigation Co.	[1956] 1 W.L.R. 629; [1956] 2 All E.R. 716; [1956] 1 Lloyd's Rep. 496	*R.*	266
Staffordshire Motor Guarantee Ltd. *v.* British Wagon Co. Ltd.	[1934] 2 K.B. 305	*Appl.*	601, 614
Stag Line Ltd. *v.* Foscolo Mango & Co.	[1932] A.C. 328; 48 T.L.R. 127	*R.*	582
Stanton *v.* Richardson	L.R. 7 C.P. 421	*Appl.*	403, 431–433, 436
Stewart *v.* Hanson	44 A.L.R. 340		120
Strathlorne S.S. Co. Ltd. *v.* Andrew Weir & Co.	40 Com.Cas. 168		424
Sun Life Assurance Company of Canada *v.* W. H. Smith & Son Ltd.	150 L.T. 211		198
Sutcliffe *v.* Holmes	[1947] K.B. 147; 62 T.L.R. 733; [1946] 2 All E.R. 599		12
Swallow and Pearson *v.* Middlesex County Council	[1953] 1 W.L.R. 422; [1953] 1 All E.R. 580		140
Sylvester *v.* G. B. Chapman Ltd.	79 S.J. 777		10
Synge *v.* Synge	[1894] 1 Q.B. 466		426
Tarrabochia *v.* Hickie	1 H. & N. 183	*Appl.*	403, 431, 432, 435
Tatem Steam Navigation Co. Ltd. *v.* Anglo-Canadian Shipping Co. Ltd.	53 Ll.L.Rep. 161		424
Taylor *v.* Great Eastern Railway Co.	[1901] 1 K.B. 774; 17 T.L.R. 394	*R.*	614
Taylor *v.* Sims and Sims	[1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375	*R.*	376
Temple Steamship Co. Ltd. *v.* Sovfracht	76 Ll.L.Rep. 35	*R.*	451
Thomas Fattorini (Lancashire) Ltd. *v.* Inland Revenue Commissioners	[1942] A.C. 643; [1942] 1 All E.R. 619	*R.*	87
Thomas (T. W.) & Co. Ltd. *v.* Portsea Steamship Co. Ltd.	[1912] A.C. 1	*R.*	250
Thompson (W. L.) Ltd. *v.* Robinson (Gunmakers) Ltd.	[1955] Ch. 177; [1955] 1 All E.R. 154	*Dist.*	117, 126, 127, 128, 130, 131, 132, 135
Thomson *v.* Cremin	1941; [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185	*R.*	377
Thomson *v.* Knights	[1947] K.B. 336; 63 T.L.R. 38; [1947] 1 All E.R. 112	*E.*	392, 394
Thorpe *v.* Fasey	[1949] Ch. 649; 65 T.L.R. 561; [1949] 2 All E.R. 393	*C.*	404, 438, 448
Thurogood *v.* Van Den Berghs and Jurgens Ltd.	[1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682		373
Tinline *v.* White Cross Insurance Association Ltd.	[1921] 3 K.B. 327; 37 T.L.R. 733		628
Trent *v.* Hunt	9 Ex. 14	*R.*	505
Treseder-Griffin *v.* Co-operative Insurance Society Ltd.	[1956] 2 Q.B. 127; [1956] 2 All E.R. 33		241
Tromp, The	[1921] P. 337		627

Truman, Hanbury, Buxton & Co. Ltd.'s Application, *In re*	[1956] 1 Q.B. 261; [1955] 3 All E.R. 559	*Appl.*	651, 658, 659
Tudor Accumulator Co. Ltd. *v.* Oceanic Steam Navigation Co. Ltd.	41 T.L.R. 81; 20 Ll.L.Rep. 106		257
Tugwell *v.* Hayman	3 Camp. 298		159
Turner *v.* Walsh	6 App.Cas. 636		71
Tynedale Steam Shipping Co. Ltd. *v.* Anglo-Soviet Shipping Co. Ltd.	52 T.L.R. 304; [1936] 1 All E.R. 389; 41 Com. Cas. 206	*R.*	273
Union Cold Storage Co. *v.* Southwark Assessment Committee	16 R. & I.T. 160	*R.*	308
United Baltic Corporation Ltd. *v.* Dundee, Perth and London Shipping Co. Ltd.	32 Ll.L.Rep. 272	*R.*	633, 643
Vedapurrati *v.* Kappan Nair	I.L.R. 35 Mad. 708		9
Vergottis *v.* William Cory & Son Ltd.	[1926] 2 K.B. 344; 25 Ll.L.Rep. 64	*R.*	300
Vergottis *v.* Wm. Cory & Son Ltd.	[1926] 2 K.B. 344	*Appl.*	403, 429
Vic Mill Ltd., *In re*	[1913] 1 Ch. 465	*R.*	128, 130, 135
Vickers *v.* Hertz	L.R. 2 Sc. & D. 113	*R.*	610
Victoria Laundry (Windsor) Ltd. *v.* Newman Industries Ltd.	[1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997	*R.*	468
Victorian Railways Commissioners *v.* Coultas	13 App.Cas. 222; 4 T.L.R. 286		11
Walkling (A.) Ltd. *v.* Robinson	46 T.L.R. 151	*N.F.*	381, 386–391
Wallis *v.* Griffiths	[1921] 2 Ch. 301		500
Walsh *v.* National Coal Board	[1956] 1 Q.B. 511; [1955] 3 All E.R. 632		58
Wandsworth District Board of Works *v.* United Telephone Co. Ltd.	13 Q.B.D. 904	*Appl.*	335, 344
Warburton *v.* Storr	4 B. & C. 103		426
Watts, Watts & Co. Ltd. *v.* Mitsui & Co. Ltd.	[1917] A.C. 227, 241; 33 T.L.R. 262		121
Webb *v.* Baker	[1916] 2 K.B. 753		384
Weldon *v.* Neal	19 Q.B.D. 394	*Appl.*	457, 479
Weldon *v.* "The Times" Book Co. Ltd.	28 T.L.R. 143		197
West *v.* Lawday	11 H.L.C. 375		243
West Derby Union *v.* Metropolitan Life Assurance Society	[1897] A.C. 647	*R.*	308
Whitfield *v.* Lord Lé Despencer	2 Cowp. 754	*Appr.*	353, 361, 362, 367, 368
Whitney *v.* Inland Revenue Commissioners	[1926] A.C. 37; 134 L.T. 98; 42 T.L.R. 58; 10 T.C. 88	*Dist.*	79, 86, 104
Wilhelm, The	14 L.T. 636		259
Wilkinson *v.* Downton	[1897] 2 Q.B. 57; 13 T.L.R. 388		12
William Porter & Co. Ltd., *In re*	[1937] 2 All E.R. 361		338
Williams *v.* Henry Williams	(Unreported, Sargant L.J.)	*R.*	105
Wilsons and Clyde Coal Co. *v.* English	[1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628	*Appl.*	369, 374, 375
Wing *v.* London General Omnibus Co.	[1909] 2 K.B. 652		174

Winter Garden Theatre (London) Ltd. *v.* Millennium Productions Ltd.	[1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331		339
Wolfe *v.* Hogan	[1949] 2 K.B. 194; [1949] 1 All E.R. 570		207
Wormald *v.* Cole	[1954] 1 Q.B. 614; [1954] 1 All E.R. 683	*C.*	3, 15, 19
Young *v.* Bristol Aeroplane Co.	[1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293; [1946] A.C. 163; [1946] 1 All E.R. 98	*Appl.*	381, 388
Yuill *v.* Yuill	[1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183	*R.*	63

STATUTES JUDICIALLY CONSIDERED

1822

Levy of Fines Act, 1822 (3 *Geo.* 4, *c.* 46), *s.* 2 **Lord Goddard C.J. 516**

1861

Offences against the Person Act, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 23 - **C.C.A. 396**

1889

Interpretation Act, 1889 (52 *&* 53 *Vict. c.* 63). *s.* 1 - - - - **Divl.Ct. 483**

1893

Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 21 (1), 25 (1) - - **C.A. 600**

—— —— *s.* 50 (2) (3) - - - **C.A. 117**

1908

Post Office Act, 1908 (8 *Edw.* 7, *c.* 48), *ss.* 12, 13 - - - - - **C.A. 352**

1911

Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 49, 102 (8) - - - **C.A. 55**

1924

Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Schedule*; *Arts. II*, *III*, *rr.* 1, 8; *IV*, *rr.* 1, 2; *V* **Devlin J. and C.A. 233**

1925

Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 84 (1) (*a*) - - - **C.A. 650**

Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24 (1), *Sch. III* **C.A. 305**

Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 29), *s.* 25 **C.A. 68**

1926

Sale of Food (Weights and Measures) Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *ss.* 4 (2), 12 (5) - - - - **Divl.Ct. 380**

1930

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43). *s.* 15 (1) - - - **Divl.Ct. 391**

1931

Architects (Registration) Act, 1931 (21 *&* 22 *Geo.* 5, *c.* 33), *ss.* 7 (1), 9 **Divl.Ct. 550**

1934

County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *ss.* 48, 52 (1) (*c*) (*as amended*) **Divl.Ct. 497**

1936

Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 12 (2) - - **C.A. 528**

—— —— —— - - - - **C.A. 535**

1938

Hire Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *ss.* 2 (2), 17 - - - **C.A. 600**

1946

Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *ss.* 2, 4 **C.A. 214**

National Insurance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *ss.* 8 (1) (*e*), 54 (1) **Divl.Ct. 508**

1947

Crown Proceedings Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 44), *s.* 9 (1) (2) - - **C.A. 352**

Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 31 (3) - **Divl.Ct. and C.A. 78**

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 24 **Divl.Ct. 564**

—— —— *ss.* 23 (2) (4), 24 (1) (3) **McNair J. 136**

1948

Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 2 (1), *proviso* **C.A. 205**

—— —— *ss.* 57, 70 - - - **C.A. 277**

Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 208 - - - - - **C.A. 33**

Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 13, 14, 15 **Lord Goddard C.J. 516**

—— —— *s.* 22 (1) - - - **C.C.A. 107**

1949

National Parks and Access to the Countryside Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 97), *s.* 31 (7) - - - - **C.A. 68**

1950

Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *s.* 22 **Devlin J. 401**

1952

Defamation Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 66), *s.* 7, *Sch. Pt. II*, *para.* 9 - - **Lynskey J. 149**

Finance Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 33), *s.* 68 - **Divl.Ct. and C.A. 78**

Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 262 **Divl.Ct. and C.A. 78**

Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 19 (5), 24 **Divl.Ct. 591**

—— —— *s.* 64, *Sch. III*, *paras.* 1, 4 **Divl.Ct. 508**

Prison Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 52), *s.* 29 (1) - - **C.C.A. 107**

1954

Housing Repairs and Rents Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *ss.* 9, 23, 49 - **C.A. 528**

—— —— *s.* 9 - - - - - **C.A. 535**

Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *Part II*, *s.* 23 (2) **Hilbery J. 615**

1955

Army Act, 1955 (3 *&* 4 *Eliz.* 2, *c.* 18), *s.* 226 (2) - - - - **C.-M.A.C. 589**

Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8 **C.A. 573**

1957

Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 1 (1) - - - - **C.C.A. 664**

UNITED STATES

Carriage of Goods by Sea Act, 1936 (*Publi* —*No.* 521—*74th Congress*), *ss.* 2. 3 (1), 4 (1) (2), 5 *and* 13 **Devlin J. and C.A. 233**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Army Act, 1955 (*Commencement*) *Order*, 1955 (*S.I.* 1955, *No.* 1805) - **C.-M.A.C. 589**

British Commonwealth and Foreign Post Warrant, 1948 (*S.I.* 1948, *No.* 590), *reg.* 61 - - - - **C.A. 352**

Industrial Disputes Order, 1951 (*S.I.* 1951, *No.* 1376), *arts.* 10, 12 (1) **Divl.Ct. 483**

National Insurance (*Contributions*) *Regulations*, 1948 (*S.I. No.* 1417 *of* 1948), *reg.* 19 (5) - - - **Divl.Ct. 508**

National Insurance (*Industrial Injuries*) (*Benefit*) *Regulations*, 1948 (*S.I.* 1948, *No.* 1372), *reg.* 2 (5) - - **Divl.Ct. 584**

Plant and Machinery (*Valuation for Rating*) *Order*, 1927 (*S.R. & O.* 1927, *No.* 480) *Sch. Class* 4 - - **C.A. 305**

R.S.C., *Ord.* 64, *r.* 14 - - **Devlin J. 401**

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

BEHRENS AND ANOTHER *v.* BERTRAM MILLS CIRCUS LTD.

[1954 B. No. 711.]

1956
Dec. 3, 4, 5,
6, 7, 13, 14,
17, 18, 19,
21.
1957
Jan. 30.

Devlin J.

Animal—Ferae naturae—Elephant—Whether ferae naturae—Liability of owner for acts of animal ferae naturae not flowing from savage disposition—Whether wrongful act of third party a defence—Midget injured when booth in funfair knocked down by elephant—Elephant irritated by dog introduced into booth by third party—Prohibition against introduction of dogs—Tame Burmese circus elephant—Midgets licensees of booth—Knowledge by midgets that elephants passing booth—Applicability of maxim volenti non fit injuria.

Rylands *v.* Fletcher. *Volenti non fit injuria.*

Damages—Personal injuries—Husband and wife—Both midgets—Choice of husband not to work while wife incapacitated—Exceptional dependence of married midgets upon each other—Choice reasonable —Husband entitled to recover loss of earnings during period of wife's incapacity.

Judicial Precedent—Ratio decidendi—Two reasons for decision—Both binding.

The plaintiffs, husband and wife, were both midgets and during the Christmas season beginning in December, 1953, were on exhibition in a booth in the funfair adjoining the defendants' circus at Olympia, which they and their manager occupied under licence from the defendants. At the far end of the funfair the defendants kept six female Burmese elephants which performed in the circus. The plaintiffs' booth was in a passageway leading from the funfair to the circus ring along which the elephants, escorted by their trainer and grooms, passed several times a day on their way to and from the circus ring. On January 2, 1954, the plaintiffs' manager had in the pay box of their booth a small dog which had been introduced into the premises contrary to the defendants' rules. As the elephants were passing the booth, the dog ran out barking and snapping at one of them. The elephant turned and went after the dog, followed by some of the other elephants, and the plaintiffs' booth was knocked down, the female plaintiff being seriously injured by falling parts of the booth. None of the elephants directly attacked either of the plaintiffs.

The plaintiffs' custom was to work together touring fairgrounds and music halls where they appeared together, either on exhibition or on the stage, but the part played by the female plaintiff was only subsidiary to that of her husband who could have obtained work without her. The plaintiffs, as was normal in the case of married midgets, were utterly dependent upon each other and during the period of his wife's incapacity the male plaintiff, whose earning capacity was not affected by her injuries, did not take any work; and, although he could have taken work and gone away on tour without her, it was found reasonable for him not to do so.

The plaintiffs, alleging, inter alia, breach by the defendants of the absolute duty laid upon the keeper of a dangerous animal to confine or control it, claimed damages. On the following pleas raised, inter alia, by the defendants: (1) that the elephants in question were not animals ferae naturae within the meaning of the rule relating to strict liability; (2) that liability was only imposed in respect of injury resulting from the acts of an animal due to its vicious and savage nature; (3) that the maxim volenti non fit injuria applied to the plaintiffs; and (4) that the act of the elephant was caused by the wrongful act of the plaintiffs' manager in introducing the dog into the funfair:—

Held, (1) that, as a matter of law, all elephants were dangerous, and that it made no difference that the particular elephant in question was a highly trained Burmese elephant and in fact tame, for the harmfulness of an offending animal was to be judged, not by reference to its particular training and habits, but by reference to the general habits of the species to which it belonged.

Filburn v. *People's Palace and Aquarium Co. Ltd.* (1890) 25 Q.B.D. 258; 6 T.L.R. 402 followed.

(2) That the keeper of a dangerous animal was under an absolute duty to confine and control it so that it should do no harm, and where injury was caused by such an animal whilst out of control the rule of absolute liability applied whether or not the injury resulted from the animal's vicious or savage propensity.

Conceptions of mens rea and malevolence could not be introduced in the case of animals, nor could animals that were ferae naturae by virtue of their genus be put upon the same footing as those which became so by exhibition of a particular habit.

Dicta of Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156, 171; 62 T.L.R. 646; [1946] 2 All E.R. 471 applied.

Wormald v. *Cole* [1954] 1 Q.B. 614; [1954] 1 All E.R. 683 considered.

(3) That the plea of volenti non fit injuria did not avail the defendants, for the passing of the elephants did not create an obvious danger, and the plaintiffs' decision, made after they had discovered that the elephants passed their booth, to continue to exercise the right which they had paid for to use the booth was not foolhardy or reckless.

Clayards v. *Dethick and Davis* (1848) 12 Q.B. 439 followed.

(4) That the wrongful act of a third party afforded no defence to liability for injury done by a savage animal, and, therefore, although the status of the plaintiffs' manager as a licensee was irrelevant (since liability depended not upon occupation of land but upon possession of the animal) and he must be deemed to be a stranger for the purposes of the rule in *Rylands* v. *Fletcher*, the defendants could not rely upon the act of the manager in introducing the dog. It followed, therefore, that the defendants were liable to the plaintiffs for all the injury caused while the elephant was out of control.

Baker v. *Snell* [1908] 2 K.B. 825; 24 T.L.R. 811 applied.

If a judge gives two reasons for his decision both are binding.

Held, further, on the question of damages, that in the exceptional circumstances of the case and since in choosing to remain at home rather than go on tour he was acting reasonably, the male plaintiff was entitled to recover as damages his loss of earnings during the time when he was fit for work and his wife was incapacitated.

Burgess v. *Florence Nightingale Hospital for Gentlewomen* [1955] 1 Q.B. 349; [1955] 1 All E.R. 511 distinguished.

ACTION.

The following statement of facts is taken substantially from the judgment of Devlin J.: The plaintiffs, Johannes Heinrich Wilhelm Behrens and his wife, Emmie Behrens, were midgets. The male plaintiff was 30 inches high and claimed to be the smallest man in the world; he was uncommon among midgets in that he was perfectly proportioned. His wife was 36 inches high and was not perfectly proportioned; she was trained to play a number of musical instruments, such as an accordion and a saxophone of a special size, well enough to enable her to contribute to the entertainment with some form of musical act when she was on the stage. The plaintiffs were married in 1932 and from 1937 to 1949 appeared together in South America, mostly in music halls. From 1949 to 1953 they were with a troupe of midgets which one Lester was taking round this country; subsequently they toured the west country with one Whitehead as their manager or impresario. There were no animals involved in this, and no stage or musical act; the plaintiffs were simply exhibited in a booth and members of the public paid their entrance money and walked into the booth to see the plaintiffs and then walked out again.

The defendant company, Bertram Mills Circus Ltd., well-known circus proprietors, held a circus at Olympia in London every Christmas season, and for that purpose rented the Grand Hall at Olympia and the annexe behind it. The circus ring and theatre surrounding it were built in the half of the Grand Hall nearest the main entrance, and in the other half of the hall and the annexe behind it there was a funfair; a space underneath a gallery running round the main hall was left outside the theatre and formed a corridor, with small booths on either side, giving access to the funfair. Beyond the funfair the defendants had a menagerie where they kept animals for show, some of the animals being those which performed in the circus, among them six Burmese elephants. Every time there was a circus performance the elephants were twice taken from the elephant house to the circus ring and back, once for the parade at the beginning of the circus and once for their act.

The defendants operated the circus themselves, but not the funfair; having rented the whole of the Grand Hall and the annexe they let out concessions to different amusement caterers, giving them the right to set up their various forms of entertainment, but they retained general control of the funfair and had two funfair managers for that purpose.

In August, 1953, Whitehead, the plaintiffs' manager, obtained from the defendants a licence for a booth in the funfair for the Christmas season beginning on December 18, 1953. He paid the defendants £172 10s. for the licence, and he and the plaintiffs in return took the whole of the money paid by members of the public for seeing their show. The terms on which they worked were that the plaintiffs put up half the money and got half the takings; they regarded themselves as partners with Whitehead, as in a commercial sense they were, although it was not admitted that they were partners in law.

The space which the plaintiffs obtained in the funfair was in a passageway underneath the gallery of the Grand Hall, with a frontage of about 20 feet. There was a front advertising "the "smallest man on earth," an entrance and an exit and between them a paybox at which Whitehead sat taking the money and attracting visitors. There were booths on both sides of the passageway, which was 13 feet wide and primarily intended for the use of the public. When the elephants left their elephant house and crossed the funfair to the circus ring they came down that passageway, in single file, the trainer walking beside the leading elephant and five other grooms walking beside the other elephants. The camels which performed in the circus came that way, too.

The plaintiffs and the Whitehead family for the duration of the show lived in two caravans which were parked at or near Earls Court. Mr. and Mrs. Behrens had a cat to which they were greatly attached and which had featured in their show and which they took every day to Olympia in one of those shopping baskets that are on wheels. Their custom was to go to Olympia in a taxi with Whitehead and the cat every morning about 11 o'clock, going to the entrance for the staff and standholders, in Blythe Road at the back of the premises. Whitehead had a daughter, Santa, then aged 11 or 12, who had a little Pomeranian dog about 12 inches long called Simba, which she kept in the caravan as a pet. On Saturday, January 2, 1954, the circus and funfair having then been going on for about a fortnight, it was arranged that Whitehead's two children should go to Olympia in the afternoon and Whitehead would try to get tickets for them for the circus show, and it was arranged that Whitehead should meet them in the foyer at the main entrance.

The children arrived in the main entrance about 2 o'clock and Whitehead was there to meet them. Santa had brought with her the dog Simba. Whitehead had not succeeded in getting them tickets for the circus and he took them round to the funfair, going first of all to his own booth, which one of the other concessionaires had been looking after for him; he then sent the two children to look around the funfair while he resumed his place at the pay box. He kept the dog. The pay box was semi-circular and had a space underneath the desk or counter so that whoever was sitting there had room for his knees. The dog was put in this space; it had a lead attached to it, and Whitehead fastened the end of this lead to one of the legs of his chair.

The circus performance had begun at 1.45. The elephants had already been out for the opening parade and back again to their house. In due course they came out again in order to do their act. As the third elephant in the procession, Bullu, was

1957

BEHRENS
v.
BERTRAM
MILLS
CIRCUS
LTD.

passing opposite Whitehead the dog, Simba, ran out snapping and barking. It is a fact well known to those who have to do with elephants that they are easily frightened by small dogs running out at them in this way. Bullu trumpeted with fright, Simba turned back and made to go into the booth and Bullu went after her. The elephant in front of Bullu went too. The trainer and grooms followed the elephants. The male plaintiff was got out of the booth and then Mrs. Behrens. The dog was killed. None of the elephants touched either of the plaintiffs, but the front of the booth and other parts of it were knocked down and some part fell on Mrs. Behrens, causing her serious injuries. The trainer got the elephants back into line again very quickly—the whole thing was over in a few seconds—and the procession went on and they performed their act.

Mrs. Behrens was seriously injured and was incapacitated until the middle of June, 1954, when she was fit to do light work. After her recovery she was unable to play her musical instruments as well as she had done before the accident, but was not completely incapacitated from taking part in any musical act and could play well enough to afford supplementary interest while her husband was on the stage. Although they received offers of work in May or June, 1954, and in 1955, the plaintiffs did not take work again until April 2, 1956, two and a quarter years after the accident, when they resumed exhibition or fairground work. They justified that long period of inactivity on the ground that their occupation consisted of a joint act of entertainment and that Mrs. Behrens was by the accident rendered unfit to play her musical instruments, the playing of which formed an essential part of the joint act. In fact the act was not a joint act, for the part played by Mrs. Behrens was only subsidiary, the main attraction being the advertisement of Mr. Behrens as the smallest man on earth, and Mr. Behrens could have obtained work without her and her injuries did not put an end to his professional livelihood. The plaintiffs, when on tour, lived in a caravan, and there was evidence that married midgets were exceptionally dependent upon each other and that it would not even be considered that one should go away to work without the other. No diminution in joint earning power after a period of eight months from the accident was proved.

One of the clauses in the licence granted by the defendants to Whitehead purported to prohibit the introduction of any cat, dog or any other animal on the stand, but, owing to a misprint, did not in fact do so; this clause was one of a very large number in one of three schedules to the licence and, although it was unlikely that Whitehead had read the clause, he did in fact know that dogs were not allowed into Olympia.

The plaintiffs, alleging, inter alia, that the defendants wrongfully kept the elephants, which were wild animals and of a dangerous, mischievous and/or vicious nature, and that the injuries and loss which they had suffered were the result of the failure of the defendants, their servants or agents, to control certain of their elephants, claimed damages; they also alleged trespass, negligence, and breach of duty by the defendants.

The defendants denied liability; they denied that the elephants were wild or of a dangerous, vicious or mischievous nature, or that they were wrongfully kept on the premises at Olympia. They contended, inter alia, that the plaintiffs by their occupation and their manner of life were well acquainted with the risks involved in their presence near to circus elephants, and well knew and understood that there was a small risk that tame elephants, such as their elephants, however carefully kept and well looked after, might on occasion while being escorted at large, through fright or other similar cause act in a manner such as to cause damage to persons in their vicinity, and that the plaintiffs had voluntarily accepted the risk.

The defendants further contended that the matters complained of were caused by the wrongful act of a third party in causing or permitting the dog to be on the premises. The allegations of trespass, negligence and breach of duty were denied.

Harold Brown Q.C. and *F. B. Purchas* for the plaintiffs. The keeper of an animal ferae naturae is under an absolute duty to confine or control it so that it shall not do injury to others: *per* Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*[1]: and is liable for all the injury which it does if it escapes out of control. In *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[2] it was held that elephants are animals ferae naturae. The class of an animal is a matter of law, and it makes no difference that an animal is in fact tame: see *McQuaker* v. *Goddard.*[3] The defendants, therefore, as the keepers of animals ferae naturae are liable to the plaintiffs for all the injury caused by the elephants while out of control.

---

[1] [1947] A.C. 156, 171; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[2] (1890) 25 Q.B.D. 258; 6 T.L.R. 402.

[3] [1940] 1 K.B. 687.

1957

BEHRENS v. BERTRAM MILLS CIRCUS LTD.

If, as a matter of law, the defendants' elephants are not animals ferae naturae, the plaintiffs will rely on their cause of action in trespass.

M. Dunbar Van Oss and *John Griffiths* for the defendants. Elephants are not animals ferae naturae as a matter of law. The question whether or not a particular animal is wild is a matter of law for the judge in each case; judicial notice is taken of the ordinary course of nature and evidence is admissible to assist the judge in that respect: see *McQuaker* v. *Goddard*,[3] in particular the judgment of Clauson L.J.[4] In *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[5] no attempt was made to inform the court that the elephant there in question came under any particular species. The defendants' elephants are highly trained Burmese elephants and in fact tame. It has never been suggested that African elephants are tame, but the court is not being asked to say that elephants as a whole are tame, and, therefore, is not precluded by the decision in *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[5] from taking judicial notice of special facts relating to Burmese elephants; in this respect the decision of a Burmese court in *Maung Kyow* (*Maney Kyaw*) v. *Ma Kyin* [6] that Burmese elephants are not ferae naturae is significant.

The liability imposed by law on the keeper of a wild animal is of a high order; the rule must be limited to its proper scope and it is submitted that the keeper is only liable for damage due to the vicious or savage propensity of the animal. The keeper of a domestic animal which is known to have dangerous proclivities is in the same position as the keeper of a wild animal, but he is not liable for injury caused by the animal which is not due to its dangerous proclivity. The extent of liability in the case of an animal ferae naturae has still to be investigated by the courts, but it is submitted that the principles are the same as in the case of a domestic animal. In all cases where the scienter rule has been applied the injury was due to the mischievous, vicious or other quality of the animal's nature; regard must be had to whether the damage is relevant to its nature: see *Hadwell* v. *Righton*.[7] It would be harsh to extend the rule of strict liability in the case of animals ferae naturae to remoter matters, and where the damage is accidental and unrelated to the fact that the animal is wild it is too remote. If a wild animal attacks, liability follows, but if the injury arises not because the animal is wild but because it is, for example, a moving object, it is not within the scope of the rule. Here there was no attack. The elephant simply turned aside to drive off the dog and in doing so knocked down the booth. The damage occurred because the elephant was a moving object and the defendants, therefore, are not liable.

---

[3] [1940] 1 K.B. 687.

[4] Ibid. 700.

[5] 25 Q.B.D. 258.

[6] (1900) 7 Bur.L.R. 73; 2 Upper Burma Rulings 570.

[7] [1907] 2 K.B. 345; 23 T.L.R. 548 (sub nom. *Hadwell* v. *Rightson*).

Wormald v. *Cole* [8] was a case of cattle trespass. There is no analogy between the action of cattle trespass and the scienter action. In cattle trespass the wrong flows from the trespass; in the case of wild animals, in the absence of negligence, there is no wrong until the animal does the kind of damage which its wild nature leads it to do. There is no wrong in harbouring a wild animal. The owner's duty is to confine and control it so that it will not do that sort of injury: *Read* v. *J. Lyons & Co. Ltd.*[9] As to the kind of mischief to be expected of elephants, see *Vedapurratti* v. *Koppan Nair.*[10]

Where the injury caused by a wild animal is due to the voluntary act of a third party, that affords a defence in a scienter action. Animals are no longer to be regarded as dangerous things within the rule in *Rylands* v. *Fletcher*,[11] but are in a class by themselves: see the observations of Lord Macmillan and Lord Simonds in *Read* v. *J. Lyons & Co. Ltd.*[12] The act of Whitehead in introducing the dog when he knew that it was wrong to do so is relied on. *Baker* v. *Snell* [13] is not an authority to the contrary. That decision has been the subject of much criticism: see Charlesworth on Negligence, 3rd ed., p. 346; Winfield on Tort, 6th ed., p. 647; Salmond on the Law of Torts, 11th ed., p. 657; see also *Knott* v. *London County Council*,[14] in particular the observation of Lord Wright.[15] In *Fleeming* v. *Orr*,[16] a Scottish case turning on a slightly different point, the court held that the act of a third party was material, and exonerated the owner of a dog. [Reference was also made to *Arneil* v. *Paterson*.[17]] In *Baker* v. *Snell*,[18] in the Divisional Court, Channell J.[19] considered that the act of a third party was a defence; Sutton J.[20] did not, and the Court of Appeal [21] was divided on that point. Cozens-Hardy M.R.[22] and Farwell L.J.[23] agreed with Sutton J.,[24] but Kennedy L.J.[25] dissented on that point. It is submitted that, as the order of the Divisional Court was affirmed on another ground on which all three judges in the Court of Appeal were in agreement, the observations of Cozens-Hardy M.R.[26] and Farwell L.J.[27] as to the act of a third party were obiter and are not binding on this court.

---

[8] [1954] 1 Q.B. 614; [1954] 1 All E.R. 683.

[9] [1947] A.C. 156.

[10] (1911) I.L.R. 35 Mad. 708.

[11] (1868) L.R. 3 H.L. 330.

[12] [1947] A.C. 156, 171, 172.

[13] [1908] 2 K.B. 825; 24 T.L.R. 811.

[14] [1934] 1 K.B. 126; 50 T.L.R. 55.

[15] [1934] 1 K.B. 126, 139.

[16] (1855) 2 Macq. 14.

[17] 1931 S.C.(H.L.) 117.

[18] [1908] 2 K.B. 352.

[19] Ibid. 354.

[20] Ibid. 355.

[21] [1908] 2 K.B. 825.

The maxim volenti non fit injuria applies to the plaintiffs. It is conceded that as licensees they were entitled to have the premises made reasonably safe for them, but it is their knowledge at the time of the accident which is material. They knew then that the elephants passed their booth and that there was a danger of them bumping into the booth; by choosing to remain they accepted that risk. [Reference was also made to *Sylvester* v. *G. B. Chapman Ltd.*[28] and *Murray* v. *Harringay Arena Ltd.*[29]]

The plaintiffs' claim for damages must be considered separately in relation to each of them. Their act was not a joint act, and, further, the claim by the male plaintiff for damages in respect of loss of livelihood because of the injuries sustained by his wife is not tenable: *Burgess* v. *Florence Nightingale Hospital for Gentlewomen*,[30] applying the principle in *Best* v. *Samuel Fox & Co. Ltd.*[31]

[DEVLIN J. That principle applies so far as the female plaintiff's musical talent is concerned, but if she had a special value as a wife to her husband is he not entitled to compensation for loss of her services as a wife?]

What is in fact a business loss cannot be claimed under that head. [Reference was made to *Lee* v. *Sheard*[32] and *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)*.[33]] The male plaintiff suffered fright but no physical injury; he cannot recover damages for fright alone. Damages may be recoverable for illness resulting from shock, but the shock must be physical and ascertainable by a physician: *Owens* v. *Liverpool Corporation*.[34] Fear is not physical, but is a preliminary to shock. [Reference was also made to *Victorian Railways Commissioners*

---

[22] [1908] 2 K.B. 825, 828, 832.
[23] Ibid. 833.
[24] Ibid. 355.
[25] Ibid. 834, 835.
[26] Ibid. 828, 832.
[27] Ibid. 833.
[28] (1935) 79 S.J. 777.
[29] [1951] 2 K.B. 529; [1951] 2 All E.R. 320n.
[30] [1955] 1 Q.B. 349; [1955] 1 All E.R. 511.
[31] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.
[32] [1956] 1 Q.B. 192; [1955] 3 All E.R. 777.
[33] [1955] A.C. 457; [1955] 1 All E.R. 846.
[34] [1939] 1 K.B. 394; 55 T.L.R. 246; [1938] 4 All E.R. 727.

v. *Coultas*[35]; *Hambrook* v. *Stokes Brothers*[36]; *Mitchell* v. *Rochester Railway Co.*,[37] and *Dulieu* v. *White & Sons Ltd.*[38]]

Harold Brown Q.C. in reply. *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[39] establishes as a matter of law that elephants are animals ferae naturae; that decision cannot be distinguished and is binding in this court. Further, the elephant in that case, as here, was a performing animal in a circus.

Liability for damage done by a wild animal while out of control cannot be limited, as suggested by the defendants, to the damage flowing from its vicious or wicked propensities. Wild animals are not in the same category as domestic animals; the owner of a wild animal keeps it at his peril and is liable for all the damage which it does if it escapes from control. The statement of the law by Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*[40] is relied on. In any event, the danger from escaping elephants comes not only from their mouths or teeth but from their momentum and natural quality of bulk. A frightened stampeding elephant does not stop to reason but bulldozes its way through whatever lies in its path.

The maxim volenti non fit injuria has no application in this case. This is not a case of a plaintiff having approached a wild animal, but of plaintiffs who were acting not recklessly but reasonably in remaining where they had a right to be. The fact that they knew that the elephants passed the booth is immaterial because there was no obvious danger; in any event the defendants never informed Whitehead or the plaintiffs of the elephants before the grant of the licence. [Reference was also made to *Smith* v. *Baker & Sons*,[41] *McQuaker* v. *Goddard*[42] and *Bowater* v. *Rowley Regis Corporation*.[43]] Before defendants can rely on the maxim volenti non fit injuria the court must be satisfied that there was a clear and obvious danger: *Clayards* v. *Dethick and Davis*.[44] The question is whether the plaintiffs, in choosing to remain in the booth, were acting reasonably. [Reference was also made to *Dann* v. *Hamilton*.[45]]

The introduction of the dog by Whitehead affords no defence to this action. Liability in respect of a savage animal has long

[35] (1888) 13 App.Cas. 222; 4 T.L.R. 286.

[36] [1925] 1 K.B. 141; 41 T.L.R. 125.

[37] (1896) 151 N.Y. 107.

[38] [1901] 2 K.B. 669; 17 T.L.R. 555.

[39] 25 Q.B.D. 258.

[40] [1947] A.C. 156, 171.

[41] [1891] A.C. 325; 7 T.L.R. 679.

[42] [1940] 1 K.B. 687.

[43] [1944] K.B. 476; 60 T.L.R. 356; [1944] 1 All E.R. 465.

[44] (1848) 12 Q.B.D. 439.

[45] [1939] 1 K.B. 509; 55 T.L.R. 297; [1939] 1 All E.R. 59.

been considered to be based on the rule in *Rylands* v. *Fletcher*,[46] and there is nothing to the contrary in *Read* v. *J. Lyons & Co. Ltd.*[47] The rule in *Rylands* v. *Fletcher*[48] allows as a defence the act of a third party only if the third party was a stranger, and, therefore, the defendants can only escape liability if they prove that the damage was due to the act of one who was a stranger within the authorities relating to that defence. Whitehead was not a stranger, but a licensee of the defendants; they were in control of the funfair and are responsible for his acts. Reliance is placed on *Hale* v. *Jennings Brothers*,[49] and see *Lawrence* v. *Jenkins*,[50] *Black* v. *Christchurch Finance Co. Ltd.*[51] and *Balfour* v. *Barty King*.[52] It is submitted, further, that *Baker* v. *Snell*[53] is conclusive on this point; the decision of the Court of Appeal was given on two grounds, and the observations of Cozens-Hardy M.R.[54] and Farwell L.J.[55] are not obiter but binding. [Reference was also made to *Box* v. *Jubb*[56]; *Rands* v. *McNeil*[57]; *Sutcliffe* v. *Holmes*[58]; *Rickards* v. *Lothian*[59]; *Northwestern Utilities Ltd.* v. *London Guarantee and Accident Co. Ltd.*,[60] and the essay by Professor Goodhart in Current Legal Problems (1951), p. 186.]

As to damages, the matter must be approached with regard to the physical peculiarities of the plaintiffs and of their limited sphere of employment and enjoyment. The male plaintiff, in the circumstances of this case, is entitled to damages in respect of the fright which he suffered. Fright is similar to physical injury, and the only difference is that it results in mental instead of physical pain: reliance is placed on the observations of Kennedy J. in *Dulieu* v. *White & Sons*.[61] It is difficult to see why damages may be awarded for physical pain and not for mental pain caused by fright. [Reference was also made to *Victorian Railways Commissioners* v. *Coultas*[62]; *Wilkinson* v. *Downton*[63]; *Mitchell* v. *Rochester Railway Co.*[64]; *Hambrook* v. *Stokes Brothers*[65]; *Owens* v. *Liverpool Corporation*[66]; *Hay* (*or*

---

[46] L.R. 3 H.L. 330.

[47] [1947] A.C. 156.

[48] L.R. 3 H.L. 330.

[49] [1938] 1 All E.R. 579.

[50] (1873) L.R. 8 Q.B. 274.

[51] [1894] A.C. 48.

[52] [1957] 2 W.L.R. 84; [1957] 1 All E.R. 156.

[53] [1908] 2 K.B. 825.

[54] Ibid. 828, 832.

[55] Ibid. 833.

[56] (1879) 4 Ex.D. 76.

[57] [1955] 1 Q.B. 253; [1954] 3 All E.R. 593.

[58] [1947] K.B. 147; 62 T.L.R. 733; [1946] 2 All E.R. 599.

[59] [1913] A.C. 263; 29 T.L.R. 281.

[60] [1936] A.C. 108; 52 T.L.R. 93.

[61] [1901] 2 K.B. 669, 670.

[62] 13 App.Cas. 222.

[63] [1897] 2 Q.B. 57; 13 T.L.R. 388.

[64] 151 N.Y. 107.

[65] [1925] 1 K.B. 141.

[66] [1939] 1 K.B. 394.

Bourhill) v. *Young*,[67] and *King* v. *Phillips*.[68]] The female plaintiff is entitled to damages for her physical injuries as such and also for the consequent limitation of her power to play musical instruments and inability ever to be part of a joint act with her husband. In addition to his damages for shock and fright the male plaintiff is entitled to damages for loss of earnings during his wife's incapacity, as she was part of his joint act and necessary to his existence as a performer or exhibitor.

Cur. adv. vult.

January 30, 1957. DEVLIN J. read the following judgment: This is a claim for damages by the plaintiffs, who are husband and wife, in respect of injuries they sustained on January 2, 1954, as the result of the behaviour of an elephant belonging to the defendants and used in their circus. The elephant knocked down a booth in a funfair adjoining the circus and a part of the booth fell on the female plaintiff causing her serious physical injuries; the male plaintiff, while outwardly uninjured, claims to have suffered from shock.

[His Lordship stated the facts substantially as set out above and continued:] These being the facts, the plaintiffs rely upon three causes of action, trespass, breach of the absolute duty laid upon the keeper of a dangerous animal to confine and control it, and negligence. Mr. Brown has not pursued before me the cause of action in trespass, while reserving his right to do so in a higher court.

The second cause of action, generally known as the scienter action, is the one on which Mr. Brown chiefly relied. Since one of the defendants' submissions goes to the root of that form of action, I propose to begin by stating just what I take its basis to be. Before doing this I must acknowledge my indebtedness to Professor Glanville Williams, who in his book on Liability for Animals (1939) has dealt with the whole subject in such detail and with such clarity as to make it possible for me at least to hope that I can successfully grapple with this antiquated branch of the law and also to omit from this judgment much of the elaboration that would otherwise have to be there.

A person who keeps an animal with knowledge (scienter retinuit) of its tendency to do harm is strictly liable for damage it does if it escapes; he is under an absolute duty to confine or control it so that it shall not do injury to others. All animals ferae naturae,? that is, all animals which are not by nature harmless, such as a rabbit, or have not been tamed by man and domesticated, such as a horse, are conclusively presumed to have such a tendency, so that the scienter need not in their case be proved. All animals in the second class mansuetae naturae are conclusively presumed to be harmless until they have manifested a savage or vicious propensity; proof of such a manifestation is proof of scienter and serves to transfer the animal, so to speak, out of its natural class into the class of ferae naturae. Professor Williams has traced at p. 265 the origin of this "primitive rule," as Lord Macmillan described it in *Read* v. *J. Lyons & Co. Ltd.*[1] No doubt in its time it was a great improvement on the still more primitive notion that only the animal was "liable" for the harm it did. But now this sort of doctrine with all its rigidity—its conclusive presumptions and categorisations—is outmoded and the law favours a flexible and circumstantial approach to problems of this sort. Four years ago a committee[2] appointed by the Lord Chancellor and presided over by Lord Goddard C.J. recommended that the scienter action should be abolished and that liability for harm done by an animal should be the same as in the case of any other chattel; it should depend on the failure to exercise the appropriate degree of care; which might in the case of very dangerous animals be "so stringent as to amount practically to "a guarantee of safety": *per* Lord Macmillan in *Donoghue* v. *Stevenson.*[3] I wish to express the hope that Parliament may find time to consider this recommendation, for this branch of the law is badly in need of simplification.

---

[67] [1943] A.C. 92; [1942] 2 All E.R. 396.

[68] [1953] 1 K.B. 429; [1953] 1 All E.R. 617.

The particular rigidity in the scienter action which is involved in this case—there are many others which are not—is the rule that requires the harmfulness of the offending animal to be judged not by reference to its particular training and habits, but by reference to the general habits of the species to which it belongs. The law ignores the world of difference between the wild elephant in the jungle and the trained elephant in the circus. The elephant Bullu is in fact no more dangerous than a cow; she reacted in the same way as a cow would do to the irritation of a small dog; if perhaps her bulk made her capable of doing more damage, her higher training enabled her to be more swiftly checked. But I am compelled to assess the defendants' liability in this case in just the same way as I would assess it if they had loosed a wild elephant into the funfair. This is a branch of the law, which, as Lord Goddard C.J. (quoting Blackburn J.[4]) said recently in *Wormald* v. *Cole*,[5] has been settled by authority rather than by reason. But once the fundamental irrationality is accepted of treating circus elephants as if they were wild, I think it is possible to determine sensibly in the light of the scienter rule the other points on liability that arise in this case.

---

[1] [1947] A.C. 156, 171; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[2] The Committee appointed to consider the Law of Civil Liability for damage done by Animals. Report presented January, 1953. Cmd. 8746.

[3] [1932] A.C. 562, 612; 48 T.L.R. 494.

The defendants submit five answers to the scienter action. They are: First, that elephants are not ferae naturae within the meaning of the rule. Secondly, that the rule does not impose liability for every act that an animal does if it escapes control, but only for those acts which are vicious and savage, which the action of Bullu was not. Thirdly, that the plaintiffs' injuries were caused by their own fault. Fourthly, that the maxim volenti non fit injuria—that is that the plaintiffs accepted the risk—applies to them. Fifthly, that it is a good defence to liability under the rule if the action of the animal is caused by the wrongful act of a third party, in this case Whitehead and his dog.

The first submission is, in my judgment, concluded so far as this court is concerned by the decision of the Court of Appeal in *Filburn* v. *People's Palace and Aquarium Co. Ltd.*,[6] which held that as a matter of law an elephant is an animal ferae naturae. Mr. Van Oss has sought to distinguish this case on the ground that the elephants belonging to the defendants are Burmese elephants and he submits that it is open to me to hold that while elephants generally are ferae naturae, Burmese elephants are not. In my judgment, it is not open to me to consider this submission. It is not stated in *Filburn* v. *People's Palace*[6] what the nationality of the elephant was with which the court was there dealing, and the case must be regarded as an authority for the legal proposition that all elephants are dangerous. The reason why this is a question of law and not a question of fact is because it is a matter of which judicial notice has to be taken. The doctrine has from its formulation proceeded upon the supposition that the knowledge of what kinds of animals are tame and what are savage is common knowledge. Evidence is receivable, if at all, only on the basis that the judge may wish to inform himself. This was clearly settled by the Court of Appeal in *McQuaker* v. *Goddard*,[7] where Clauson L.J.[8] said: "The reason why the evidence was given was for the "assistance of the judge in forming his view as to what the "ordinary course of nature in this regard in fact is, a matter of "which he is supposed to have complete knowledge." Common knowledge about the ordinary course of nature will extend to a knowledge of the propensities of animals according to their different genera, but cannot be supposed to extend to the manner of behaviour of animals of the same genus in different parts of the world. Nor can one begin a process of inquiry which might lead in many directions (for example, I am told that female elephants are more docile than male, and that that is why circus elephants are usually female) and be productive of minute subdivisions which would destroy the generality of the rule.

---

[4] In *Smith* v. *Cook* (1875) 1 Q.B.D. 79, 82.

[5] [1954] 1 Q.B. 614, 621; [1954] 1 All E.R. 683.

[6] (1890) 25 Q.B.D. 258; 6 T.L.R. 402.

The defendants' second contention raises a point of doubt and difficulty. It may be approached in this way. The reason for imposing a specially stringent degree of liability upon the keeper of a savage animal is that such an animal has a propensity to attack mankind and, if left unrestrained, would be likely to do so. The keeper has, therefore, in the words of Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*[9] "an absolute duty to "confine or control it so that it shall not do injury." But if it escapes from his control, is he liable (subject, of course, to the rules on remoteness of damage) for any injury which it causes, or only for such injury as flows naturally from its vicious or savage propensity?

Mr. Van Oss submits that it is the latter part of this question which suggests the correct answer and that the rule of absolute liability applies only when an animal is acting savagely and attacking human beings. On the facts of this case, he submits that Bullu was not acting viciously but out of fright; she was seeking to drive off the small dog rather than to attack it; maybe she or another elephant trampled on the dog (there is no conclusive evidence of that, and it might have been crushed by falling timber) but there is nothing to show that she trampled on it deliberately. Certainly she never attacked Mrs. Behrens who was injured only indirectly. In short, if Bullu could be treated as a human being, her conduct would not be described as vicious but as quite excusable.

---

[7] [1940] 1 K.B. 687; 56 T.L.R. 409; [1940] 1 All E.R. 471.

[8] [1940] 1 K.B. 687, 700.

[9] [1947] A.C. 156, 171.

It does not, to my mind, necessarily follow that the scope of the rule is co-extensive with the reason for making it. It may equally well be argued that once the rule is made, the reason for making it is dissolved and all that then matters are the terms of the rule. That would certainly be the right approach in the case of any statutory rule of absolute liability. Is it so in the case of this rule of common law? There appears to be no authority directly in point. Mr. Van Oss derives the chief support for his contention from an argument which may be summarized as follows. If an animal mansuetae naturae manifests a vicious tendency, the scienter rule applies to it as if it were ferae naturae. The law has often been put in that way; for example, by Lord Wright in *Knott* v. *London County Council.*[10] How is the principle applied? Suppose a large dog collides with a child and knocks him down, that is an accident and not a manifestation of a vicious propensity and the scienter rule does not apply at all; if it bites a child, it becomes ferae naturae, and the strict rule thereafter applies. But it would seem to be unreasonable that the strict rule should require it to be kept under complete restraint. Suppose that its keeper muzzles it and that while muzzled it playfully or accidentally knocks a child down, ought the keeper to be liable? There is a good deal of authority, referred to by Professor Williams, to show that the keeper is not liable; and the learned author considers that the damage must have in some way been intended by the animal, that its benevolence or its mens rea is relevant and that at least in the case of harmless animals the rule is that the injury must be the result of a vicious propensity.

This is an impressive argument. But it does not seem to me that the logic of the matter necessarily requires that an animal that is savage by disposition should be put on exactly the same footing as one that is savage by nature. Certainly practical considerations would seem to demand that they should be treated differently. It may be unreasonable to hold the owner of a biting dog responsible thereafter for everything it does; but it may also be unreasonable to limit the liability for a tiger. If a person wakes up in the middle of the night and finds an escaping tiger on top of his bed and suffers a heart attack, it would be nothing to the point that the intentions of the tiger were quite amiable. If a tiger is let loose in a funfair, it seems to me to be irrelevant whether a person is injured as the result of a direct attack or because on seeing it he runs away and falls over. The feature of this present case which is constantly arising to blur the reasoning is the fact that this particular elephant Bullu was tame. But that, as I have said, is a fact which must be ignored. She is to be treated as if she were a wild elephant; and if a wild elephant were let loose in the funfair and stampeding around, I do not think there would be much difficulty in holding that a person who was injured by falling timber had a right of redress. It is not, in my judgment, practicable to introduce conceptions of mens rea and malevolence in the case of animals.

---

[10] [1934] 1 K.B. 126, 139; 50 T.L.R. 55.

The distinction between those animals which are ferae naturae by virtue of their genus and those which become so by the exhibition of a particular habit seems to me to be this: that in the case of the former it is assumed (and the assumption is true of a really dangerous animal such as a tiger) that whenever they get out of control they are practically bound to do injury, while in the case of the latter the assumption is that they will only do injury to the extent of the propensity which they have peculiarly manifested. It would not be at all irrational if the law were to recognize a limited distinction of this sort while holding that both classes of animals are governed by the same scienter rule. In the case of dangerous chattels, for example, the law has recognized, though it is not perhaps now of much importance, the distinction between chattels that are dangerous in themselves and chattels that are dangerous when used for certain purposes; and animals ferae naturae have frequently been compared with chattels in the former class: see, for example, *per* Hilbery J. in *Parker* v. *Oloxo Ltd.*[11] and *per* Lord Wright in *Glasgow Corporation* v. *Muir.*[12]

As I have said, there is really no authority on this point. There are indeed not many cases which have dealt with an animal that is ferae naturae by genus as distinct from disposition. In such cases as there are—*Besozzi* v. *Harris*[13] and *Filburn* v. *People's Palace*[14]—the rule was stated in the widest terms; but in these cases the court was dealing with an attacking animal, so that the point did not arise. Nevertheless, in my judgment, they laid down the principle that I should follow; and I think that the statement of the law by Lord Macmillan in *Read* v.

---

[11] [1937] 3 All E.R. 524, 528.

[12] [1943] A.C. 448, 464; 59 T.L.R. 266; [1943] 2 All E.R. 44.

[13] (1858) 1 F. & F. 92.

[14] 25 Q.B.D. 258.

J. Lyons & Co. Ltd.,[15] which I have quoted, namely, that there is " an absolute duty to confine or control it so that it shall not " do injury " needs no qualification.

This conclusion is supported by *Wormald* v. *Cole*.[16] I do not rely on that decision as an authority directly in point because it concerned the rule of absolute liability for cattle trespass, and these rules of absolute liability, while similar in effect, have different origins. But it furnishes strong support by way of analogy. In that case the plaintiff, when she was trying to get straying cattle out of her garden, was injured not because they attacked her but because in blundering about they had knocked her down. It was argued that the plaintiff could not recover because her injuries were not the result of any vicious action on the part of the cattle. This argument was rejected by the Court of Appeal. Lord Goddard C.J.[17] pointed out that in many cases it would be impossible to say with certainty whether the injuries were caused by vice or playfulness or by mere accident.

It follows that, subject to any special defence, the defendants are liable for any injury done while the elephant was out of control. It does not follow (I say this because of a point that was raised in the argument) that if an elephant slips or stumbles, its keeper is responsible for the consequences. There must be a failure of control. But here there was such a failure, albeit a very temporary one. It follows also that the ordinary rule on remoteness of damage applies. It was not suggested that if an animal which is out of control knocks over a structure and injures a person the other side of it, that is not under the ordinary rule a consequence of the failure of control.

The third point taken by the defence is that the injuries were due to the plaintiffs' own fault. This defence is of a nature well recognized in this class of case and there are many cases in which liability has been successfully contested on the ground that the savage animal was teased or provoked by the plaintiff. I see no reason why the same sort of defence should not prevail where the fault of the plaintiff does not amount to recklessness of this sort, but is failure of due diligence to look after his own safety. The facts said to constitute the defence in this case are pleaded in paragraph 6A of the re-amended defence: " Further or in the " alternative the matters complained of were caused or contri- " buted to by the negligence of the plaintiffs and each of them " in that they permitted the said dog to be in or near to the said

---

[15] [1947] A.C. 156, 171.

[16] [1954] 1 Q.B. 614.

[17] Ibid. 625.

1957

BEHRENS v. BERTRAM MILLS CIRCUS LTD.

Devlin J.

"booth well knowing that dogs were not permitted upon the "circus premises and/or that dogs were likely to alarm or excite "the elephants." In my judgment, this plea breaks down completely upon the allegation that the plaintiffs permitted the dog to be in or near the booth. Even if I were to assume that the plaintiffs knew of the presence of the dog and to assume likewise the other allegations in the paragraph, there is nothing at all to sustain the allegation of permission. Whitehead was not in their employ and they had no power to control him in any way. Conceivably, it might be said that if the presence of the dog amounted to an obvious danger, anyone who knew of it, whether he had power to order it off or not, ought in the interests of his own safety to have reported it to someone who had the necessary authority. But no one puts the danger as high as that.

The fourth contention of the defence is a plea of volenti non fit injuria based on the allegation that the plaintiffs accepted any risk inherent in the passage of elephants past their booth. There is no evidence that either the plaintiffs or Whitehead knew or had any reason to suspect when the licence was granted that the elephants would come anywhere near their booth. Mr. Van Oss, however, submits that the time when the licence was entered into is not the decisive time, or not the only decisive time. He submits that when the plaintiffs discovered, as of course they did at the beginning, that the elephants passed the booth, their decision to remain amounted to an assumption of the risk. The situation at this later point of time raises quite different considerations. The plaintiffs had not then to decide, in the light of their knowledge of the conditions under which it would have to be exercised, whether they would acquire a right; but whether they would continue to exercise a right for which they had already paid. It is not per se a defence that the plaintiffs were engaged in exercising a right. The pursuit of one's own rights may sometimes be so foolhardy that the reasonable man should desist and seek another remedy. If a man is on the highway and he sees elephants approaching in procession, the law does not require him to elect between turning down a side street or accepting the risk of their misbehaviour if he goes on; but if he sees them stampeding and remains where he is because he considers that he has as much right to the highway as they have, he might fail to recover. I take the law on this point as that laid down in *Clayards* v. *Dethick and Davis*.[18] In that case the defendants made an open trench outside the plaintiff's stable and told him

---

[18] (1848) 12 Q.B. 439.

1957

BEHRENS
v.
BERTRAM
MILLS
CIRCUS
LTD.

Devlin J.

that he must put up with it. The plaintiff attempted to get his horse out by means of planks over the trench, and was advised by the defendants not to do so because it was dangerous. An accident occurred and the plaintiff was held entitled to recover. He was not bound to refrain from exercising his rights because there was some danger. As Patteson J. put it[19]: "The whole "question was, whether the danger was so obvious that the "plaintiff could not with common prudence make the attempt." The same principle has recently been considered in the Privy Council in *Reardon Smith Line Ltd.* v. *Australian Wheat Board.*[20] It cannot here be contended that the passing of the elephants created an obvious danger; indeed, the case as pleaded for the defence is that the risk was very small. This plea fails.

The last of the defendants' contentions is that they are freed from liability by the wrongful act of a third party. This point appears to be concluded against them by the decision of the Court of Appeal in *Baker* v. *Snell*,[21] in which it was held by a majority that the intervening act of a third party was no defence. But Mr. Brown, perhaps because he had his eye on a place where *Baker* v. *Snell*[22] would naught avail him, or perhaps because he feared that I might be deterred from following the decision by the volume of criticism that has since flowed over it, gave it no place in the van of his argument. Non tali auxilio, except, of course, in the alternative.

He preferred to rely on general principles, rather than on any specific authority, for his chief submission on this point. He submitted that the liability in respect of a savage animal was based on the rule in *Rylands* v. *Fletcher.*[23] That rule allows as a defence the act of a third party only if it is the act of a stranger; and a licensee is not, he submitted, to be regarded as a stranger. Whitehead was a licensee and, therefore, his intervention afforded no excuse.

There are in the authorities numerous dicta to suggest that the liability for savage animals is a branch of the rule in *Rylands* v. *Fletcher.*[23] Professor Glanville Williams (p. 352, note 4) has collected the cases. These dicta may have to be reconsidered in the light of what was said in *Read* v. *J. Lyons & Co. Ltd.*,[24] particularly *per* Viscount Simon.[25] Whether or not the two rules stem from a common principle, it would no doubt be legitimate in formulating the exceptions, if any, to the liability for savage animals to look at exceptions that have already been established under other rules of strict liability. But, whether the process be one of analogy or one of derivation, it must be remembered that the underlying conditions for the two kinds of liability are different. One is based on the possession of an animal and the other on the occupation of land. If in relation to the former the holding of a licence is to have any materiality, it must refer to some licensed custodian of the animal, such as the potman in *Baker* v. *Snell*.[26] The fact that in this particular case the defendants not only were the keepers of the elephant but had also rented the premises on which the animal was at the time of the accident and licensed the third party to be on them is wholly irrelevant to any question of liability in the scienter action. If the defendants had granted a concession for the performance of the circus or the keeping of a menagerie as well as for the funfair, and, accordingly, the elephant had been kept by some other defendant, it could not possibly be relevant in an action against him to show that the defendant and a third party were both concessionaires or licensees of the same licensor. It cannot make any difference in principle if the keeper of the animal happens also to be the licensor. In my judgment, therefore, if the rule in *Rylands* v. *Fletcher*[27] is to be applied, Whitehead must be deemed for its purposes to be a stranger.

---

[19] 12 Q.B. 439, 446.

[20] [1956] A.C. 266, 281–282; [1956] 1 All E.R. 456.

[21] [1908] 2 K.B. 825; 24 T.L.R. 811.

[22] [1908] 2 K.B. 825.

[23] (1868) L.R. 3 H.L. 330.

[24] [1947] A.C. 156.

[25] Ibid. 167.

Mr. Brown relied upon *Hale* v. *Jennings Brothers*,[28] particularly the observations of Slesser L.J.[29] If in this case I were dealing with liability which arose out of the occupation of land, these dicta would be in point. For the reasons I have given, I think that they are here irrelevant in determining the status of Whitehead. I do not mean that the relationship of licensor and licensee is necessarily irrelevant on consequential issues of fact. Accepting Whitehead as a stranger, it would still be necessary for the defendants to show that they took all reasonable precautions to prevent him or any other stranger from interfering with their animals; and it might well be that reasonable precautions would include, since they happened incidentally to be licensors, using their powers under the licence, to control his conduct, for example by forbidding dogs. But that would raise another point which would go to an issue of negligence. That is an answer to the third party defence which could arise on the facts, and in that light I shall refer to it again, but, in my judgment, Whitehead's status as a licensee does not of itself dispose of that defence as a matter of law.

---

[26] [1908] 2 K.B. 825.

[27] L.R. 3 H.L. 330.

[28] [1938] 1 All E.R. 579.

[29] Ibid. 583.

I turn to *Baker* v. *Snell*.[30] In that case the defendant was a publican who owned a dog known by him to be savage. It was the duty of his potman to let the dog out early in the morning and then chain it up again. On the occasion in question the potman brought the dog into the kitchen where the plaintiff, who was a housemaid in the employment of the defendant, was at breakfast and saying: "I will bet the dog will not bite anyone "in the room," let it go, saying: "Go it, Bob." The dog then flew at the plaintiff and bit her. In the county court the judge held that the act of the potman was an assault for which the defendant was not liable and he non-suited the plaintiff. The non-suit was attacked on two grounds. It was contended [31] that the defendant was liable as the keeper of the dog, and that the intervening act of the potman, even if he had been a stranger, would be no defence. Secondly, it was contended that, if the intervention did provide a good ground of defence, nevertheless since in this case the intervener was the defendant's servant and acting within the scope of his employment, the defendant must be liable on that ground. A new trial was ordered both in the Divisional Court [31] and on appeal by the Court of Appeal,[32] and in both courts the judges were unanimous. But they were not unanimous in their reasons. In the Court of Appeal, all three of the Lords Justices agreed that the question whether or not the potman was acting in the course of his employment was one of fact which ought to have been left to the jury, and that a new trial must be ordered on that score. But Cozens-Hardy M.R. and Farwell L.J. considered also, as had Sutton J. in the court below, that the defendant was liable as the keeper of the animal and that the intervention of the potman, even if not acting in the course of his employment, created no defence. Even on this view a new trial was necessary as it was not open to the Court of Appeal to assess the damages. On this point Kennedy L.J. disagreed, sharing the view expressed by Channell J. in the Divisional Court.

It is not, I think, disputed that if the reasoning of the Master of the Rolls and Farwell L.J. is binding upon me, I must dismiss without further inquiry a defence based on the act of Whitehead. Mr. Van Oss submits that the gist of the decision was the order for a new trial on the grounds on which the Lords Justices were unanimous, and that the observations of Cozens-Hardy M.R. and Farwell L.J. on the other point should be treated as obiter. This question depends, I think, on the language used by the Master of the Rolls. It is well established that if a judge gives two reasons for his decision, both are binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. But the practice of making judicial observations obiter is also well established. A judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is a matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course has been adopted from the language used and not by consulting his own preference.

---

[30] [1908] 2 K.B. 825.

[31] [1908] 2 K.B. 352.

[32] Ibid. 825.

Cozens-Hardy M.R. first dealt with the judgment of Channell J.,[33] and agreed with his view that the scope of the potman's employment ought to have been left to the jury. He said[34]: "I entirely adopt that view, and that, no doubt, is in "itself a sufficient reason for affirming the decision of the court "below, but as a matter of wider interest has been raised, and "as it has been dealt with by both Channell and Sutton JJ., "I think it right to state, shortly, my view on the point." If this passage had stood by itself, I think that I should have probably construed it as signifying that the Master of the Rolls did not wish—as would be quite natural in a case where there was a considerable conflict of judicial opinion—to give the force of precedent to views which were not necessary to the decision in the case. But after he had considered the other point and expressed his view about it, he said this[35]: "On these authorities, and in accordance with what in my judgment is settled "law, I think that the matter ought to go down for a new trial, "not merely on the ground stated by Channell J., though I agree "that is sufficient, but also on the ground as to which he "expressed some doubt, but on which Sutton J. appears to have "based his decision." In this final sentence of his judgment I think that the Master of the Rolls was clearly basing his decision on the two grounds, and that it is not open to me to choose between them. I have said that this point depends upon the language of the Master of the Rolls, because I think that it is plain from the language used by Farwell L.J.[36] that he gave as the principal ground for his judgment that the wrongful act of a third person was no defence.

---

[33] [1908] 2 K.B. 352, 353.

[34] Ibid. 825, 828.

[35] Ibid. 832, 833.

Accordingly, I hold this contention, that is the last of the defendants' contentions, to be concluded against the defendants by authority which binds me. The result is, therefore, that the rule of strict liability applies, and the defendants must compensate the plaintiffs for their injuries.

I have reached this conclusion on the law without having to go very deeply into the facts and, indeed, on the basis of facts which were almost all undisputed. There was, however, a good deal of dispute on other questions of fact which may become relevant if different conclusions are reached on the law. I shall, by way of an appendix to this judgment, set out my findings on these points in case they may be material hereafter. But before I do that I must deal with the assessment of damages, which also raises some difficult questions of fact and law.

The item in the claim for damages which gives rise to most difficulty, both on the facts and on the law, is the claim for loss of earnings. The husband and wife were paid jointly. The takings and expenses were all dealt with jointly, and no part of the net earnings was appropriated as the special property of one or the other. I cannot, however, give joint damages and it will be necessary for me to consider how far each of the two individually has suffered a financial loss as the result of his or her injuries respectively. It will also be necessary for me to consider whether the husband is entitled in law to recover for financial loss caused to him as a result of the injuries which his wife sustained. But before I do this, I think it would be convenient, in order to get at the true facts about the loss of earnings, to put these matters momentarily on one side and consider how far the accident affected their joint earning power.

[His Lordship referred to the facts relevant to this part of the case set out above, and continued:] On the evidence I have heard I do not think the act can really be regarded as a joint one, and I accept Mr. Van Oss's submission that the act was not a joint act, and that other diversions could be arranged for Mr. Behrens.

But I am also satisfied that it would not be reasonable to expect the male plaintiff to go touring or to go round fairgrounds and exhibitions by himself and without the company of his wife. The two of them in the witness-box made it very manifest how exceptionally dependent they are upon each other, and he in particular upon her. It is very understandable that it should be so. They live in a strange world and the bond between them must be much stronger even than the ordinary tie of matrimony. This impression that I received of their interdependence was much fortified later by the evidence of Mrs. Lester when she went into the witness-box. She has long experience of working with midgets. She said that it was well known that "little "people" were devoted to each other, that he would not be much good without her, and that it was reasonable for him to say that he could not work alone, that in this respect midgets were different from ordinary people. She would not necessarily expect his wife to be on the stage while the male plaintiff was performing, but at any rate in the auditorium. It must be remembered, too, that, even if he felt at home with ordinary people, the male plaintiff could not when he was on tour mingle with them; if the public are to pay to see him, he must, except when on the stage or in the booth, keep out of sight. It is customary for the plaintiffs to go round in a caravan, which is parked as near as possible to his place of work, and in which they have to spend most of their time. It would not be reasonable to expect the male plaintiff to live there in solitude and with no one to look after him.

---

[36] [1908] 2 K.B. 833, 834.

But was Mrs. Behrens unfit to accompany her husband and to play the sort of part I have indicated, looking after him, being with him, and perhaps doing a little on the stage? [His Lordship referred to the evidence, and continued:] In the face of the evidence that Mrs. Behrens was fit for light work in the middle of June, 1954, and in the absence of any evidence that she was unfit to go with her husband on tour, I find it impossible to say that the defendants' liability for loss of earnings can extend much beyond that date. I think that it is reasonable to feel that the offer of work in 1954 came rather before the plaintiffs could be expected to be ready for it, and that they were entitled to some period after recovery to look around for work; but if I fix the total period of incapacity at eight months, I think that that is as much as I can do. I assess the joint loss of earnings for that period at £360.

I must now proceed to consider in what proportion this special damage is recoverable as between the two plaintiffs, and whether the husband has a good cause of action in respect of the whole of his proportion and what sums of general damage should be awarded to each plaintiff individually.

I shall take Mrs. Behrens first. She received half the benefit of the joint earnings and may therefore be taken to have been paid half. It is in my judgment nothing to the point to submit that as her part of the act was much smaller than that of her husband she was, commercially speaking, worth less than half. So long as the arrangement was a genuine one and husband and wife, rightly or wrongly, regarded their contributions as being of equal value, the loss to the wife is a loss of what she was getting and not of what she would have got if her husband had been disposed to drive a harder bargain. This approach to the subject affects Mrs. Behrens' general damage as well as her special, and in the case of the general damage it works for the advantage of the defendants. I am satisfied that in the future as in the past her husband will continue to rate the support he gets from her as being worth half the joint earnings; therefore so long as he is alive and working the wife's disablement will not cause her any professional loss. I think that her damages, both special and general, must be assessed on this basis. Accordingly, I award £180 as special damage to Mrs. Behrens.

Her general damage must be substantial. Her injuries were considerable and they have left some permanent effects of pain and discomfort. I have to take into account that the discomfort, if not pain, which the injuries continue to cause her may well make her work with her husband more arduous, and I have to assess her damages in the light of the arduous work which she has to do if by her support of her husband she is to earn her share of the joint takings. I have also to consider that her ability to earn her own living, if her husband should die has been diminished by her inability to perform a musical act on her own. I assess her general damage at £2,750.

I turn now to the male plaintiff's claim. Can he be compensated for the loss of half the joint earnings? That raises one question of law and another is raised in the assessment of the general damage. I shall take the latter first. The real claim presented by Mr. Brown is for fright. An elephant coming over the top of a booth would be a terrifying thing even for an ordinary man, and although the male plaintiff asserts that he was not frightened, I am satisfied that the shock must have been considerable. I should like to award him a substantial sum under this head, but I am satisfied that I cannot do so except to the extremely limited extent that the shock resulted in physical or mental harm. I think that that is clearly the effect of the authorities. When the word "shock" is used in them, it is not in the sense of a mental reaction but in a medical sense as the equivalent of nervous shock; MacKinnon L.J. in *Owens* v. *Liverpool Corporation*[37] refers to it as being "ascertainable by "the physician" and as "the form of ill-health which is known as "shock." I appreciate that it is now becoming increasingly difficult to define the boundaries of mental ill-health. But without infringing the general principle embedded in the common law that mental suffering caused by grief, fear, anguish and the like is not assessable, *Owens* v. *Liverpool Corporation*[37] goes as far as any court can go and I cannot accept Mr. Brown's invitation to attempt an extension of what is there said.

The medical history in relation to the male plaintiff is almost negligible. He went to hospital with his wife after the accident, but was not admitted; and in fact the first time he was seen by a doctor was nearly three years later for the purposes of this action. He returned to Olympia the day after the accident in order to look for his cat. He was then obviously very distressed and upset, but that may well have been largely due to his feeling for his wife. It is said in the medical report that thereafter he went to bed for a week. I think it would not be unreasonable if I were to treat that as some form of nervous prostration which amounted to ill-health. He was thus unable to earn money during that period, though that would probably have been impossible anyway owing to the destruction of the booth; the defendants were not, however, concerned to explore this minutely. I assess the damage under this head at £25.

The other form of ill-health that is relied on is some detrimental effect on an existing chest condition. It does not appear that his chest was ever examined, but his statement that before the accident he suffered from minor chest trouble and that since the accident he has been more prone to chronic bronchitis is accepted in the medical report; and the opinion is expressed that it is probable that the shock had some detrimental effect on his chest condition. Apart from shock, I should have thought it likely that in the case of a man over 60 minor chest troubles might begin in any event to get slightly worse. But here again the defendants have not been disposed to niggle, and I assess the damage under this head at £50.

There is, therefore, left only the male plaintiff's claim for loss of half the joint earnings. I take £10 of this loss as being

---

[37] [1939] 1 K.B. 394, 400; 55 T.L.R. 246; [1938] 4 All E.R. 727.

1957

BEHRENS v. BERTRAM MILLS CIRCUS LTD.

Devlin J.

included in the figure of £25 which I have already awarded in respect of his own physical incapacity. The balance of £170 depends on whether he is entitled to compensation in respect of the period when he was fit to work and his wife was not. If the male plaintiff's loss consisted simply of the fact that the loss of his wife's musical talent made the joint act less valuable to him, I should hold that he could not recover. I decided that way in *Burgess* v. *Florence Nightingale Hospital for Gentlewomen*[38] where a similar point arose under the Fatal Accidents Acts. But that is not the point here: I have found as a fact that the male plaintiff has proved no loss under that head. His loss lies in the fact that Mrs. Behrens would, if her husband had gone on tour, have been unable to give him the society and domestic help which only she as a wife could give. In *Burgess* v. *Florence Nightingale Hospital for Gentlewomen*[38] it was not suggested that the arrangement between the parties in that case depended in any way on the relationship of husband and wife.

If Mr. Behrens during his wife's incapacity had gone on tour, he might have had to have paid someone to take his wife's place on the stage and he would also have had to have paid someone to look after him in the caravan. The first payment he could not have recovered from the defendants; on the facts he would have sustained no loss, since he would not have had to have paid his wife her share of the earnings and she would have her own independent claim for the loss of that share; in law the loss, if he had sustained it, would not be recoverable. But the second payment he could have recovered, and, I think, have added to it a claim for compensation for the loss of his wife's society which no substitute domestic help could give. If she could not be with him in her customary place, it would not to my mind matter that that place was a caravan and not the ordinary matrimonial home. It would not be merely an impairment of the consortium, but a total, though temporary, loss of it.

But in fact he did not go on tour. He preferred to stay at home and accept the loss of earnings; and in the very peculiar circumstances of this case I have held that his choice was a reasonable one. Can he then recover his loss of earnings as damages? To hold that he can may be breaking new ground in this type of action, but I can see no reason in principle why he should not be thus compensated. The assessment of damage must be governed by those principles which apply generally in the law of tort and, provided he acts reasonably, he must be put in as good a position, so far as money can do it, as if the wrong had not been done to him. I repeat that on the facts this is a most exceptional case, turning on the exceptional need which this husband had for the support of his wife as a wife. Because of that I think that he is entitled to recover.

---

[38] [1955] 1 Q.B. 349; [1955] 1 All E.R. 511.

The result is that there will be judgment for the male plaintiff for sums totalling £480, and for the female plaintiff for £2,930.

I shall now deal with issues of fact, whose determination is not necessary for my judgment but may be material hereafter. Evidence was called on both sides about the behaviour of elephants. There was evidence to show how elephants behave in Burma and how they behave in circuses in England. I admitted this evidence de bene esse at the request of both sides, but in this court it is immaterial, since I am bound by the decision in *Filburn* v. *People's Palace and Aquarium Co. Ltd.*[39]; "it is "not competent to the courts to reconsider the classification of "former times," *per* Neville J. in *Heath's Garage Ltd.* v. *Hodges*.[40] If, however, it was open to me to answer the question as one of fact, I should answer it on the evidence before me by saying that some elephants are dangerous and some are not and that this one is not.

The next issue is an allegation of negligence against the defendants. That would arise for consideration either as an alternative cause of action, if I am wrong in holding that the rule of strict liability applies; alternatively, as a possible answer to a defence based upon the act of a third party, if I am wrong in holding that such a defence is not arguable at all in law.

The negligence alleged falls under three heads, namely, (1) that no sufficient precautions were taken to exclude dogs from Olympia; (2) that the elephants in their passage to and from the circus ring were not properly controlled; and (3) that there were no posts or fencing on either side of the route which the elephants took to the circus ring. The first of these charges raised an issue on which much evidence was called and which I must deal with in some detail. The second and third can be disposed of shortly and I shall take them first.

It was not argued that the elephants should not have been in the funfair at all, though it may seem at first sight a dangerous manoeuvre to lead a procession of elephants along a route, 13 feet wide, which may be thronged by the public, and which has booths on either side which an elephant would very easily knock down if it deviated. But in fact that manoeuvre happens many hundreds of times every season in which the defendants hold their circus, and I dare say the same sort of manoeuvre happens many hundreds of times elsewhere, and I accept the evidence that it happens without incident. Subject to strict precautions being taken to see that there is nothing on the route that is likely to startle the elephants, I find that there is no lack of proper care in this. Mr. Brown submitted that the elephant ought to be controlled, either by a man riding on her with a goad or else leading her by a rope attached by a hook to her ear, as is apparently the practice in Burma. It is not, however, the practice with circus elephants who, manifestly, if they are trained to a higher standard of obedience for circus tricks must also be trained to be more obedient than traction elephants. I find that there was no lack of proper control. I was in fact very much impressed by the trainer in the witness-box; and also by the way in which the elephants were brought so speedily under control after the accident. On the other point, namely, the allegation that there should have been posts or a fence, I was not offered any evidence from people experienced in the handling of elephants, but Mr. Brown invited me to conclude that such a precaution was a matter of common sense. I cannot draw that conclusion. It seems to me that, granted that the route was a proper one, any posts and fence which it would be reasonable to erect, bearing in mind that the public cannot be fenced off from access to the booths, would be quite useless.

---

[39] 25 Q.B.D. 258.

[40] [1916] 2 K.B. 370, 383; 32 T.L.R. 570.

[The following is a summary of the further findings of fact made by his Lordship: The defendants gave strict instructions to all their employees on the premises, and particularly to those stationed at the main entrance, that among other things dogs and other animals were not to be admitted and those instructions were reasonably well executed. Although there was some evidence to suggest that the defendants were resigned to the possibility of small animals occasionally getting into the fun-fair, a standard of care, reasonable in the circumstances, was employed to lay down and enforce instruction for those who guarded the public entrance. The omission to put up any notice at the public entrance was not in itself sufficient evidence of negligence.

The rule prohibiting animals was not merely one made by the defendants for their circus but was made also by Olympia Ltd. and applied to the whole building at all times, and instructions were given to their gatekeepers; there was no evidence to show in what way those instructions were carried out. There was no prohibitive notice at the staff and standholders' entrance, and a standholder might quite properly have thought that there would be no objection to his bringing a pet animal into his booth provided he kept it under control when he got there. The clause purporting to prohibit animals contained in Whitehead's licence would, even if it had been correctly printed, have been insufficient notice to the standholder of the prohibition, for it was not in a place where the standholder's attention might reasonably have been expected to be caught by it, and, as against a third party, reasonable steps had not been taken to notify the standholder of the prohibition. His Lordship was not satisfied on the evidence that the defendants took all reasonable steps to see that small animals were not brought into the funfair by a standholder such as Whitehead. Whitehead did, however, know of the prohibition. His Lordship continued:]

The next issue relates to a contention, based on the fact that I have just found, that Whitehead's act was wrongful. The term "wrongful" is taken for this purpose because it is the widest of the many epithets (others are malicious, criminal, deliberate, voluntary, conscious) that are to be found in the authorities as characterizing the sort of intervention by a third party which (if the minority view in *Baker* v. *Snell* [41] was right) would afford a ground of defence. This is largely a question of law; but, as it raises some questions of fact, I shall deal with it.

If Whitehead was right in thinking that he was forbidden to bring a dog into Olympia, his introduction of it was a trespass. But was he in fact forbidden? That depends on the terms of his licence. If he had erroneously thought that he was permitted to bring in a dog when in fact his licence forbade it, it would be no answer for him to say that he had not read or had misconstrued his licence. But if the licence erroneously contains no prohibition, and perhaps by implication a permission, does it avail the defendants to say that Whitehead, not having read the licence, thought that there was a prohibition, which was in fact what they intended? I can leave that point for argument, if necessary, elsewhere, and also the question whether a trespass is a wrongful act within the meaning of the principle. Mr. Van Oss rested his submission that the act was wrongful chiefly on the contention that the introduction of the dog was wrongful, not as being deliberate or malicious (there is no evidence of that) but as being reckless or negligent. Whitehead denied that he

[41] [1908] 2 K.B. 825.

appreciated the danger, and I can find no sufficient reason either for rejecting his denial or for holding that he ought to have appreciated it. Most people probably know that a small dog may disturb cattle, but I do not believe that there is the same general knowledge about elephants. A man might reasonably think that an elephant would ignore so small an irritation and that, at least if the dog was securely tied up, it would be no danger.

The last issue of fact that I have to determine is whether the plaintiffs or either of them knew that the dog was there.

[His Lordship having considered the evidence on this issue, said that he was not satisfied that the plaintiffs knew of the presence of the dog in the funfair.]

Judgment for the plaintiffs.

Solicitors: *Chalton Hubbard & Co. for Marsh & Ferriman, Worthing; William Charles Crocker.*

J. F. L.

METLISS *v.* NATIONAL BANK OF GREECE AND ATHENS S.A.

[1955 M. No. 4083.]

C. A.
1957
Feb. 12, 13, 14;
Mar. 18.

Denning, Romer and Parker L.JJ.

Conflict of Laws—Succession—Corporation—Foreign legislation—Comity—Universal succession—Foreign bank liable on English debt—Obligations on debt suspended in foreign bank's State of origin by moratorium—Legislation by foreign State merging debtor bank with another bank in State of origin—New amalgamated bank decreed "universal successor" to former banks—Recognition of universal succession by English courts—Right of creditor to sue new bank in England—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 208.
Conflict of Laws—Foreign legislation.

In 1927 a Greek bank issued sterling mortgage bonds, repayable as to principal in 1957 with interest thereon meanwhile. A term of the bonds provided that questions arising should be settled in accordance with English law. The bonds were guaranteed as to principal and interest unconditionally by another Greek bank.

In 1941 payment of interest ceased and no further interest was paid thereafter. In 1949 the Government of Greece declared a moratorium (which continued in force at all material times) on all obligations on the bonds, including any right of action. In 1953 by an Act of the Government of Greece and by royal decree the

C. A.

1957

Metliss
v.
National
Bank of
Greece and
Athens S.A.

guarantor bank and a third Greek bank (hitherto unconnected with the bonds) were amalgamated into a new banking company, and it was enacted that the new company was the "universal successor" to the rights and obligations of the amalgamated companies.

In 1955 an offer was made by the original debtor bank to English bondholders, to be guaranteed by the new company. The plaintiff, the holder of bearer bonds, did not accept that offer, but brought an action in the High Court against the new company, claiming interest from 1941 to 1955 inclusive, on the ground that the entire assets and liabilities of the guarantor bank, including its liability under the guarantee, had been assigned and transferred to the new company. Sellers J. awarded the plaintiff six years' interest.

On appeal by the new company it was conceded that the proper law of the bonds was English law:—

Held, (1) that the plaintiff could sue the new company in England as the universal (or statutory) successor to the old companies by Greek law, although the new company was not a party to the original guarantee, for the general principles of international comity required the English courts to recognize and give effect to the foreign law which had substituted the new company as the universal successor of the old, unless such recognition was shown to be prejudicial to the rights of English creditors; and there was no evidence in the present case of any such prejudicial effect.

Per curiam. The English courts should recognize the principle of universal succession which our own legislation has adopted in the Companies Act, 1948, s. 208.

(2) That the plaintiff could sue on the debt in England as an English debt free of the moratorium, for the acceptance of the foreign law as to the status of the new company did not involve applying the foreign law as to its obligations.

Kleinwort, Sons & Co. v. *Ungarische Baumwolle Industrie Aktiengesellschaft* [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38 applied.

Decision of Sellers J. affirmed.

Appeal from Sellers J.

On December 1, 1927, the National Mortgage Bank of Greece (a company incorporated under Greek law) issued £2,000,000 7 per cent. sterling mortgage bonds. In each of the bonds the National Mortgage Bank of Greece promised to pay the bearer the principal moneys on December 1, 1957, and meanwhile interest half-yearly at 7 per cent. Payment was to be made in sterling at the offices of Hambros Bank Ltd. or Erlangers in London, and at the option of the holder at the National Bank of Greece in Athens by cheque on London. In case of any question arising, it was to be settled by arbitration in London in accordance with the laws of England. The bonds were guaranteed by the National Bank of Greece (a company incorporated under Greek law) in these words: "The National Bank of Greece "hereby unconditionally guarantees the due payment of the "principal moneys and interest and the due performance of all "the conditions of this bond."

On December 1, 1935, the provisions of the bonds were modified so as to reduce the rate of interest from 7 per cent. to $4\frac{3}{4}$ per cent. Bondholders resident in Greece were to be paid only in drachmae. Bondholders permanently resident outside Greece were to be paid in sterling. This modification was stamped on the bonds by an over-stamp. The National Bank of Greece agreed to this modification and their guarantee was continued in full force notwithstanding the modifications.

On April 27, 1941, the Germans captured Athens and occupied Greece: and in the result the National Mortgage Bank of Greece was left with nothing with which to pay the bonds. No further payments were made on the bonds, either during the occupation or since. In November, 1949, the Government of Greece passed a law which suspended all obligations on the bonds, by setting up a moratorium. The substantive rights of the bearers of the bonds were suspended. The remedies by action or otherwise were suspended. It was illegal for the debtors to pay either principal or interest. That moratorium continued at first until June 30, 1952, but it was renewed from time to time and was still in being at the time of the present action.

By Act No. 2292, made on February 18, 1953, the Greek Government passed a law authorizing the amalgamation or merger of banking companies, and it was enacted that "the company "which absorbs another company by merger, or the new company formed by the amalgamation, becomes the universal "successor to the rights and obligations in general of the amalgamated companies, without any further formality or act "whatsoever." By a royal decree, dated February 27, 1953, made in pursuance of that Act, it was enacted that "as from "the publication of the present decree, the National Bank of "Greece Ltd. and the National Bank of Athens Ltd." (a bank hitherto unconnected with the bonds) would cease to exist and "the entire property of each of them in its whole (assets and "liabilities) on the day of publication is considered as being automatically contributed to the new limited liability banking "company (the National Bank of Greece and Athens Company) "constituted by virtue of these presents, which is substituted "ipso jure and without any other formality in all rights and "obligations of the said amalgamated banks, as their universal "successor."

The new amalgamated company (the defendant company in the present proceedings) was protected in Greece by the moratorium law. On October 27, 1955, the principal debtor, the National Mortgage Bank of Greece, made an offer to the English bondholders to pay them in sterling on the following terms: The principal debt was to be reduced by one-half; all interest from June 1, 1941, to November 30, 1954, was to be waived; and the interest on the bonds from December 1, 1954, onwards was to be 2½ per cent. only. The new amalgamated company guaranteed the performance of those terms by the principal debtor, the National Mortgage Bank of Greece. If the offer was not accepted the bondholder remained subject to the moratorium law.

That offer was advertised in the Financial Times, and Hambros and Erlangers were authorized by the Bank of England to say that permission had been given under the Exchange Control Act, 1947, for bondholders to accept the offer if they so desired. The plaintiff, who was the holder of bearer bonds to a total of £21,900, did not accept the offer, but brought the present action in December, 1955, claiming interest at 4¾ per cent. on £21,900 for 14½ years from June 1, 1941, to June 1, 1955, inclusive. His statement of claim recited the bonds and the guarantee by the National Bank of Greece. It did not allege any novation by way of contract with the new company; and the only paragraph which brought in the new company was as follows: "The defendants are a corporation constituted under "the laws of Greece and carrying on business inter alia at 6, Old "Jewry, E.C.2, in the County of London. By a Greek decree "dated February 27, 1953, the entire assets of the National "Bank of Greece (including their liability under the said guarantee) were assigned and transferred to the defendants." The defendants denied liability.

At the hearing before Sellers J. the defendant company contended that the proper law of the bond was Greek law. In his judgment on July 12, 1956, Sellers J. held that the proper law was English law, and said that in that event the Greek decrees and the moratorium could not be relied on either by the mortgage bank or by the guarantor bank, since the obligation under the bond was to pay in sterling in London. The Greek law and the evidence of the Greek lawyers established that if the original guarantor company, which by Greek law had ceased to exist, would have been liable on the guarantee, so would the defendant company ipso facto as the universal successors of the original guarantor.

His Lordship gave judgment for the plaintiff on his claim for interest limited to the six-year period prior to the issue of the writ in December, 1955, namely, £6,241 5s. 1d.

The defendant company appealed. On the hearing of the appeal it was conceded for the defendants that the proper law of the bonds was English law.

Harold Lever and *J. H. R. Newey* for the defendant bank. The plaintiff has no cause of action in the English courts against the defendant bank, for it is a stranger to the bond and to the guarantee. When a foreign company is dissolved, by the law of its State of origin the remedy of an English creditor in England is to apply to have its assets in England administered by a winding-up action: see Halsbury's Laws of England, 3rd ed., vol. 7, p. 13, and Cheshire's Private International Law, 4th ed., p. 478. If there are no assets in England, that remedy has no practical value; that indicates why this plaintiff did not seek a remedy until after the amalgamation with a company which had assets here.

[ROMER L.J. When the defendants in 1955 offered to guarantee the offer of the original debtor, were they not holding themselves out as the transferees of the liabilities and assets of the dissolved company, including the obligation on the guarantee?]

No cause of action can be based on such a holding-out. The plaintiff could try, as he has done, to rely on an estoppel, but he could not go further unless he could show a contract by novation. There is no such plea; the plaintiff relies solely on the Greek decree of amalgamation. But that decree cannot substitute in these courts a new debtor for the old. The court ought not to recognize or give effect to the universal succession; just as our courts do not recognize the status of a foreign administrator unless there has been an English grant: see Halsbury's Laws of England, 3rd ed., vol. 7, p. 65, and Cheshire, 4th ed., p. 515.

Alternatively, if the Greek decree has made the new company the universal successor of the old and it thereby becomes answerable on the English debt in an English court, it is answerable only on the terms of the whole of the Greek law to which the new company was specifically made subject—including the moratorium in force at the date of the amalgamation decree. The succession must be taken with its burdens as well as its benefits. The plaintiff cannot use Greek law when it suits him and reject it when it does not. The effect of the moratorium was to make it illegal for any Greek bank to make payments to sterling bondholders; such payments would constitute a penal breach of the Greek currency laws; no sterling bondholders could enforce payment in a Greek court, nor would a Greek court allow the execution of a foreign judgment in favour of legal owners; and any such payment would be contrary to Greek public policy. Thus the amalgamation decree assigned to the new bank a suspended and not an immediate obligation.

John Foster Q.C. and *Mark Littman* for the plaintiff. It is of the nature of private international law that on certain substantive matters the foreign law is to be looked at, while on others which are procedural in their nature the foreign law is disregarded. If the first submission for the defendants is correct, it would follow that there could never at any future time be any cause of action in England on the guarantee, although it is an English debt. It would also follow that the assets of the former companies in England would not pass to the new company but would become bona vacantia. That would lead to chaos in the City of London.

The universal successor here has succeeded to both the assets and the liabilities of the former companies, including the unconditional guarantee subject to English law. Universal succession is a concept familiar in European legal systems: see Martin Wolff, Private International Law, 2nd ed., p. 357, para. 334, on the system of community of goods between spouses. The principles of private international law require our courts to decide by reference to Greek law whether a corporation incorporated in Greece is a juristic person and what that juristic person is; and where the foreign law puts a new corporation in the shoes of the old the English courts will look at the law of its State of incorporation to discover what the new juristic personality is, just as we look to the law of a natural person's domicile to discover his status. The Russian bank cases show that the decree of a foreign government can abolish the former debtor; but where the decree makes the new bank the universal successor of the old, the new person is the same as the old, and is entitled to the assets and liable on the obligations of the old companies in this country without more, so that it is not necessary for the plaintiff to show a new contract in order to sue the new company here. It is conceded that a foreign administrator cannot sue in this country without an English grant; that is procedural; but if there is a universal successor by foreign law the English courts should recognize it. In *Beavan* v. *Lord Hastings*,[1] though it was held that a universal successor under Belgian law was not liable to a creditor in equity in an English court, Sir William Page Wood V.-C.[2] indicated that an action at law would lie against the universal successor; see also Cheshire, Private International Law, 4th ed., pp. 516–517. In *Bergerem* v. *Marsh* [3] Bailhache J. said that the succession of a foreign trustee in bankruptcy would be recognized here. Support for the submission that the plaintiff can sue the universal successor here is to be found in section 208 of the Companies Act, 1948, for it provides that where the court has sanctioned an amalgamation it can order all the assets and liabilities of the former companies to be transferred to the new. No interpretation of those sections would be valid which restricted the effect to liabilities recognized by English law. It must operate extraterritorially, for reasons of the comity of nations. Thus, British Railways could be sued in New York on the pre-existing debts of the old railways without any conveyance of property in New York being effected. Section 208 clearly contemplates the transfer of liabilities governed by foreign law.

There is no direct authority on universal succession, possibly because the principle is so obvious. Dicey, Conflict of Laws, 6th ed., affords some slight support; see rule 99, p. 440, rule 107, p. 458, the proviso as to "natural persons," and Illustration 4, p. 459; but the only authority cited is *Beavan* v. *Lord Hastings*.[4] The English courts recognized the doctrine of succession with regard to community of goods in *De Nicols* v. *Curlier*.[5]

Secondly, the principle of private international law which requires the court to recognize the universal successor is distinct from the principle applicable to its liabilities in England. The decision in *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft* [6] is conclusive authority against the defendants' submission that the plaintiff cannot sue in England because the liability is by Greek law subject to the moratorium, for this court there decided that where there was a contract, the proper law of which was English, the Hungarian State exchange regulations did not apply to it. The universal successor, like the heir in Roman law, is liable for the debts of the deceased, and those debts include the English debt, which is not in England cut down by the moratorium, though the moratorium is available to protect the new bank against claims in Greece.

---

[1] (1856) 2 K. & J. 724.

[2] Ibid. 727–728.

[3] (1921) 6 B. & C.R. 195.

[4] 2 K. & J. 724.

[5] [1900] A.C. 21; 16 T.L.R. 101.

[6] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

[PARKER L.J. Cannot the foreign government imply in its decree that no liabilities shall be transferred which are contrary to public policy?]

That would involve the English courts recognizing the public policy of a foreign country, and that is not done. If the moratorium had been passed just before the amalgamation decree the English courts would, on any claim by the plaintiff, have ignored the moratorium. Similarly, they will ignore it on the present claim.

Lever in reply. If the doctrine of universal succession is recognized here, a real danger will accrue, for the new bank would against its will be saddled with all the obligations of the two former companies, and that would be contrary to all good commercial practice and might prejudice creditors of the old companies. Though *Bergerem* v. *Marsh* [7] appears to be a case in which our courts recognized a succession which operated simply by virtue of a foreign law, it is not an important decision and should not be followed.

[ROMER L.J. The trouble is that it has found its way into Dicey in rule 99 (6th ed., p. 440).]

The rule as stated is limited to bankruptcy, and a trustee in bankruptcy is usually an officer of the court. It is conceded that there may be circumstances in which an English court would accept the jurisdiction of an appointment by a foreign State or court; but to recognize the doctrine of universal succession on so wholesale a scale as to change the debtor of an English creditor offends against the fundamental principles of English law.

Cur. adv. vult.

March 16. The following judgments were read.

DENNING L.J. stated the facts up to the date of the moratorium in 1949, and continued: Notwithstanding that moratorium, if an English bondholder had brought an action in the English courts for the interest due to him, either against the principal debtor, the National Mortgage Bank of Greece, or against the guarantors, the National Bank of Greece, or against both, the English courts would without doubt have given judgment for the interest due. The English courts would not have recognized the moratorium. The proper law of the contract was English law and no enactment of the Government of Greece could affect the matter: see *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft.*[1] A judgment of the English courts against those Greek companies would, however, have been of little use to an English bondholder because it was not enforceable in Greece, as the moratorium law forbade its enforcement there: and it would have been of little use in England because, so far as we know, neither the National Mortgage Bank of Greece nor the National Bank of Greece had any assets in England on which a creditor could levy execution. No English bondholder thought it worth while to seek to obtain a judgment in the English courts against those companies for the interest due to him.

---

[7] 6 B. & C.R. 195.

In 1953 came the event which lies at the root of the present proceedings. The Greek Government passed a law amalgamating the National Bank of Greece (the guarantor of the bonds) with the Bank of Athens (a bank hitherto unconnected with the bonds). Those two banks are now amalgamated into one new banking company called the National Bank of Greece and Athens. Let me pause a moment to state the importance of this amalgamation in these proceedings. The plaintiff, Metliss, the holder of some of the bonds, now seeks to recover the interest on the bonds from this new company: and he brings this action in the English courts for the purpose. The reason is not far to seek. The Bank of Athens had, before the amalgamation, carried on business in this country for many years. It presumably had assets here. If the new amalgamated company has taken over those assets, they may be available to satisfy any judgment which the plaintiff may obtain in the English courts.

Before I discuss the amalgamation, however, I must complete the history. The new amalgamated company was, of course, protected in Greece by the moratorium law just as its predecessors had been: and it seems to have assumed that it was protected in England too. It did not anticipate an action by a bondholder in England like the plaintiff. On this assumption, the principal debtor, the National Mortgage Bank of Greece, on October 27, 1955, made an offer to the English bondholders to pay them in sterling on these terms: [His Lordship stated the terms of the offer set out above, and the nature of the plaintiff's claim, and continued:] There was a great contest in the court below as to whether the proper law of the contract contained in the bonds is English law or Greek law. The judge decided that it is English law, and there is no appeal from his decision on that point.

---

[1] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

The two points raised in the appeal are these: First, the new amalgamated company says that it is not liable to be sued in the English courts on the bonds because it was not a party thereto; secondly, it says that if it can be sued, it can pray in aid the moratorium law of Greece to avoid the liability.

The first point raises a question of great importance in private international law. The plaintiff says that by Greek law the new amalgamated company is the universal successor of the old National Bank of Greece and that the English courts will recognize that succession so that he can sue the new amalgamated company without more ado. The plaintiff does not allege any novation by way of contract with the new company. His statement of claim recites the bonds and the guarantee by the National Bank of Greece, and the only paragraph which brings in the new amalgamated company is this: "The "defendants are a corporation constituted under the laws of "Greece and carrying on business inter alia at 6, Old Jewry, "E.C.2, in the County of London. By a Greek decree dated "February 26, 1953, the entire assets of the National Bank of "Greece (including their liability under the said guarantee) were "assigned and transferred to the defendants." In the reply the plaintiff sought to rely on an estoppel, but it was not pursued before us. The plaintiff rests his case solely on the Greek law relating to the amalgamation. I will therefore state what it is.

[His Lordship stated the enactments of February 18 and February 27, 1953, as set out above, and continued:] The English courts will recognize the Greek law as effective to dissolve the two former banking companies. They were Greek companies. It is only by Greek law that they gained any existence at all. If we recognize their existence by Greek law we must also recognize their dissolution by the same law: see *Lazard Brothers & Co.* v. *Midland Bank Ltd.*,[2] *per* Lord Wright. We also recognize the existence of the new amalgamated company, just as we recognize the existence of any other foreign company. But the question is, do we recognize the new amalgamated company as the universal successor of the former companies, so that it can sue and be sued for their debts without more ado?

The Greek lawyers in their evidence made it plain that their concept of a universal successor is derived from the Roman law, and particularly from succession of an heir on the death of his testator. On looking again into the books of Roman law, I find that the maxim of classical Roman law was that "hereditas est "successio in universum jus quod defunctus habuit." The heir stepped into the shoes of the deceased so far as the property rights were concerned. The debts due to or by the deceased were regarded as due to or by the heir personally. The testator and the heir were regarded by law as one person. The heir was liable for the debts of the deceased even though the estate was insufficient to meet them: but Justinian introduced a way of escape by allowing an heir to take the beneficium inventarii, by which, if he made an inventory of the estate within 90 days, he was not liable beyond the assets. If he did not take with benefit of inventory he was liable personally in full.

---

[2] [1933] A.C. 289, 297; 49 T.L.R. 94.

This concept of the universal successor is firmly entrenched in Continental systems of law: and the important question for our consideration is whether our English courts should recognize it and give effect to it. It is, be it noted, a very different concept from that of a receiver or administrator whose only duty is to collect and distribute the assets which come to his hands. We have nothing quite like it except the amalgamation of two corporations into one by statute, in which case the new amalgamated corporation succeeds to all the rights and liabilities of the former corporations and is, in effect, the universal successor of them. Take, for instance, the amalgamation in 1923 of the numerous railway companies into four main companies, or the amalgamation in 1947 of those four companies into one nationalized corporation, the British Transport Commission. By our law the new corporation succeeded to all the assets and liabilities of the former companies. Even though one of the former companies was insolvent, nevertheless the new amalgamated company had to pay its debts in full: see *In re Lee-on-Solent Railway Co. and Southern Railway Co.*[3] This succession included their assets and liabilities, not only in this country but also in foreign countries. The British Transport Commission succeeded, for instance, to the assets of the Southern Railway Co. in France, and also to any liabilities incurred by that company for negligent navigation by their ships in French waters. I have reason to believe that the French courts, familiar as they are with the concept of a universal successor, hold without hesitation that the British Transport Commission succeeded to these assets and liabilities by virtue of the English statute without any further authority. Other countries would, no doubt, do the same. So also we should recognize a universal succession by foreign law.

---

[3] [1923] 2 K.B. 771; 39 T.L.R. 620.

Mr. Harold Lever asked us, however, to ignore the laws of other countries and decide this case by English law: he said that if we were to recognize universal succession by foreign law, it might produce injustice to English creditors. His argument proceeded on these lines: In English law a creditor has a right to look to his debtor for payment of the debt and to the assets of that debtor: and he cannot be forced to take anyone else instead, unless there is a new agreement by which he does so. Take this very case and consider the creditors of the two former banks. The English creditors of the old Bank of Athens were entitled to look for payment to that bank; and, notwithstanding the moratorium, in case of default they were entitled to enforce their debt against the assets of that bank in England. Upon dissolution of the bank by Greek law, the English creditors could still have recourse to the English assets by means of a winding-up order: see sections 399 and 400 of the Companies Act, 1948, and *Russian and English Bank and Florence Montefiore Guedalla* v. *Baring Bros & Co.*[4] Likewise the English creditors of the National Bank of Greece were entitled to look for payment to that bank; but, inasmuch as it had apparently little or nothing in the way of English assets, on its dissolution its English creditors had not much to gain from an English winding-up order. Now consider, it is said, what would happen if the English courts were to recognize the new amalgamated bank as the universal successor of the two former banks. The English creditors of the old Bank of Athens would have the English assets of that bank swept out of their grasp and made available for the English creditors of the old National Bank of Greece. If the assets were insufficient to pay the debts of both banks in full, the creditors of one bank would suffer a loss and the creditors of the other an advantage, contrary to the justice of the case. This is a real difficulty, but I think it can be surmounted by taking a leaf out of the book of Roman law. The Roman jurists had to consider the case where the testator was solvent, but the heir was insolvent. When the heir took over as universal successor, there was a danger that he might use the testator's assets to pay his own creditors, and so the creditors of the dead man might suffer accordingly. To remedy this

[4] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.

injustice the praetor gave relief by separating the assets. This meant that the creditors of the testator might apply to have the estates kept distinct until the debts were paid. This had to be done within a reasonable time, before the estates became inseparably mixed. No creditor who had in any way accepted the personal liability of the heir could afterwards claim to have the assets separated: see the Digest of Justinian, Book 42, Title 6, Article 1 (I), Article 2, X, XII, XV.

Likewise, it seems to me that the English courts would be able to devise machinery to prevent injustice to any creditors or group of creditors: but we are not called on to decide that point in this case. Suffice to say that it is not sufficient to detract from the general principle of universal succession. It is obvious that in the great majority of cases it is just and convenient for this country to recognize universal succession by the law of the domicile: and we ought not to be deterred from this recognition by the hypothetical case of a possible injustice, especially when the law may well be able to meet it, if and whenever it should arise.

It is interesting to notice that the courts of the United States have faced a similar problem and have arrived at a similar conclusion. They draw a sharp distinction between a succession established for a corporation by the law of its creation, and a receiver or liquidator appointed for a corporation still in being: see *Clark* v. *Williard*.[5] The former is called a " statutory successor " and his title is recognized everywhere, whereas the title of a receiver is not. The principle is stated in the Restatement of the Law of Conflict of Laws (Ch. 6, para. 161, at pp. 234–235) in these words: " If a statute of the State of incorporation " which is in force at the time of the dissolution of a corporation " provides that all its assets shall, upon dissolution, pass to a " person designated in the statute, the right of such person to " the personal property, wherever situated and whether tangible " or intangible, will be recognized and given effect by other States " and the designated person can bring suit in any State upon " claims due to the corporation. . . . If the law of the State " of incorporation provides that a statutory successor shall be " subject to the obligations of the corporation, the liability of " the statutory successor will be recognized in other States." Although the principle of universal succession is thus clearly recognized by the courts of the United States, they have run into difficulties about the protection of local creditors. There is no uniform policy on this point: see *Clark* v. *Williard*,[6] *per* Cardozo J.; but this does not detract from the principle itself.

---

[5] (1934) 292 U.S. 112, 120, 121; (1935) 294 U.S. 211, 212–213.

My conclusion is, therefore, that the English courts will recognize this universal succession by the law of Greece and will, accordingly, hold that the new amalgamated company can sue and be sued here as a person who stands in the shoes of the former companies. It is entitled to all the assets and subject to all the liabilities of the former companies just as if it had itself contracted them. To take a parallel from ordinary life: just as the status of an individual, his birth, his death, his marriage and succession are governed by the law of his domicile: so also the status of a corporation, its creation, its dissolution, its amalgamation and succession are governed by the law of its incorporation.

This brings me to the second point. The defendant company says that if the English courts recognize Greek law so as to make it liable as universal successor, so also they should recognize the Greek law of moratorium. The English courts cannot, it is said, when dealing with the liability of the defendant company, take the Greek law in part and reject it in part. They must recognize it in whole or ignore it altogether.

This is a forceful argument, but I do not think we can give effect to it. The rules of private international law do not permit it. The debtor is a Greek debtor but the debt is an English debt. When we are considering the personality of the debtor or succession to his personal effects, we must apply Greek law because he is a Greek; but when we are considering the amount of the debt and the obligation to pay it, we must apply English law because it is an English debt. If the old National Bank of Greece had continued in existence, the English courts would give judgment against that company for immediate payment without regard to the moratorium. Greek law has destroyed the old National Bank of Greece and has set up the new company in its place. We recognize that Greek law has power of life and death over the company which it created, and we must accept the substitute which it has provided. But when the substitute stands in our courts to answer for an English debt, it must answer according to English law, which says that the debt must be paid according to its terms. I am of opinion that the defendants are liable in this action, and I would dismiss the appeal.

---

[6] 294 U.S. 211, 214–215.

ROMER L.J. In this case the plaintiff is suing the defendant company on a guarantee to which the company was not a party. The guarantors were the National Bank of Greece, but the plaintiff's case is that by reason of a decree passed in Greece (which was the country of the National Bank's domicile) the bank ceased to exist in 1953 and the whole of its assets and liabilities, including the liability to the plaintiff under the guarantee, became vested in the defendant company. The plaintiff does not, and could not, rely on novation, but he rests his claim solely on the decree coupled with the fact (now admitted by the defendant company) that the proper law of the contract of guarantee was English. The defendant company's answer, in short, is that our courts will not recognize or enforce against it a liability which it did not contractually accept but which was imposed upon it by foreign law, videlicet, by the law of Greece.

The decree operated on the Bank of Athens as well as on the National Bank of Greece, and its effect under Greek law seems to be fairly clear, and was proved by experts who were called at the trial. In the course of his evidence Mr. Seferiades was asked by Mr. Foster what the expression "assets and "liabilities" in Article 4 of Law No. 2292 comprised. He answered: "The construction of the whole article leaves in my "opinion no doubt at all that by 'liabilities and assets' it "includes all liabilities and rights, but the most important part "of this section is the words 'universal successor.' It cannot "be treated as anything else except as succession; not as a "contractual relationship imposed by law. It would have been "quite inconceivable. The law abolishes the personality of the "one party. There is not the element of parties in a contract "being imposed by law. There is not the element of a specific "object. Sellers J.: That gets over the necessity for the new-"comer to contract? (A) Yes; it has universal succession." A similar view was expressed by Mr. Zaoussis, who said in cross-examination: "Imagine the following situation—that there was "an action against the old bank, the action was served before "the amalgamation and the trial was fixed after the amalgama-"tion. Well, at the trial the new bank would take the place "of the old bank and the position would remain exactly the "same. The law provides this and it would be exactly the "same. That is the meaning of Article 4. (Q) And that is "the meaning of 'universal successor'? (A) Yes, in this case."

The position accordingly is that under Greek law the defendant company became automatically entitled, on its creation, to the assets of the two former companies and subject to their then existing liabilities. By reason of section 8 of Decree 2292, however, the obligations to which the defendant company became subject were mitigated by such conditions and circumstances as had attended them previously; and among these was the moratorium which the Greek Government had declared in relation to the bonds.

There is no direct authority on the point which we have to consider but, in the absence of some compelling reason to the contrary, one would suppose that, on general principles of international comity, our courts would accord full recognition to these results, under Greek law, of the amalgamation of 1953; just as we would expect the courts of another civilized country to recognize the effect of an amalgamation of English companies under the Companies Act, 1948.

The dissolution under Greek law of the National Bank of Greece is a fact which clearly has to be, and is, recognized by our courts. If a foreign corporation is dissolved by its own domestic law "its existence as a juristic person ceases in the "eyes of English law" and thereafter it cannot be sued here (Cheshire's Private International Law, 4th ed., p. 478). Accordingly, the old Bank of Greece ceased for all relevant purposes to exist in 1953. It is further established that the status and powers of a foreign corporation which is still in being are ascertained and determined by reference to the law of the country in which it has its domicile: Dicey's Conflict of Laws, 6th ed., pp. 194, 195, namely, the country in which it is incorporated. That being so, we would surely look also to the country of the company's incorporation to discover what incidents had been attached by its laws to the body which it had created. Having ascertained what they are, effect would, in general, be given to them in our courts. I say "in general" because the recognition which we accord to foreign legislative or administrative acts is subject to one important qualification, namely, that municipal laws will not be given an extra-territorial effect if they are prejudicial to the rights of other nations or to those of their subjects (*per* Selwyn L.J. in *The Halley*).[7] Subject to this qualification I can see no reason why we should not recognize and give effect to the defendant company's succession to the

---

[7] (1868) L.R. 2 P.C. 193, 203.

C. A.
1957

Metliss
v.
National
Bank of
Greece and
Athens S.A.

Romer L.J.

assets and liabilities of the former banks which resulted from (and which was indeed the whole object of) the amalgamating decree. It cannot be said that the succession was in any way repugnant to our own system of jurisprudence, for we ourselves have adopted it in the amalgamation of companies under section 208 of the Companies Act, 1948. Apart altogether from that, however, it is well-established that we will give effect to foreign adjudications (or their equivalent) of bankruptcy—provided at all events that the foreign bankruptcy does not discriminate against creditors in this country. Moreover, it was held in *Dulaney* v. *Merry & Sons* [8] that a trustee under a deed of assignment for the benefit of creditors executed by a foreign debtor in the country of his domicile, and valid by the law of that country, can establish in the courts of this country a good title, as against an execution creditor, to goods in this country belonging, at the date of the assignment, to the debtor, although the deed had not been registered pursuant to the Deeds of Arrangement Act, 1887. The deed in that case had been executed in the State of Maryland, and Channell J.[9] drew attention in his judgment to the fact, proved in evidence, that English creditors and other foreign creditors would rank pari passu with the American creditors in the administration of the estate under the deed. Another illustration of the recognition by our courts of succession under foreign law is to be found in the case of the death of persons of foreign domicile; the beneficial succession, whether testate or intestate, to the movables of such persons is governed by the law of the domicile. Finally, and of more direct relevance to the present case, is a proposition which is exemplified by Illustration No. 4 of Dicey's Conflict of Laws (6th ed., p. 459). That is to the effect that if A., an Englishman, dies in a foreign country and B. becomes his successor there without benefit of inventory, B. can be sued here for a debt which A. had incurred in his lifetime to an English creditor. *Beavan* v. *Lord Hastings* [10] is cited in support of that proposition, though the editors recognize in the footnote that the case is not a direct authority; Sir William Page Wood V.-C. did not in fact have to deal with the point, for the only issue before him was whether the plaintiff creditor had a remedy in equity and he decided that he had not. In the course of his judgment, however, the Vice-Chancellor does appear to be assuming that the plaintiff could have sued the defendant, as universal successor to his brother, by an action at law; but

---

[8] [1901] 1 Q.B. 536; 17 T.L.R. 253.

[9] [1901] 1 Q.B. 536, 539.

[10] (1856) 2 K. & J. 724, 727.

LIB. LONDON UNIV.

one cannot tell from the note of the argument to what extent (if at all) that aspect of the matter was canvassed.

The foregoing considerations all tend to support the view that we ought to recognize the effect under Greek law of the dissolution of the two former companies and the creation of the defendant bank; but subject always to the qualification to which Selwyn L.J. referred in *The Halley.*[11] Under Greek law the defendant company became entitled to such assets (if any) as the National Bank of Greece possessed in this country; and I can see no reason why, subject to safeguarding the rights of the creditors, our courts should not have assisted the defendant company to obtain possession of those assets. As a corollary we should, in my opinion, also enforce against the defendant company the liabilities which accompanied the right to the assets. Unless, therefore, the amalgamation is within Selwyn L.J.'s qualification, the liability on which the plaintiff is suing in this action appears to me to be an incident of the amalgamation which should be recognized and enforced by our courts. That the incident is favourable to the English creditors of the old National Bank of Greece cannot be doubted. While that corporation was still in existence it could have been sued here. Its dissolution prevented any such action from being taken thereafter, but the creditors could have presented a petition to wind it up under section 400 of the Companies Act, 1948. The right to do so was not interfered with by the Greek decree (nor could it have been) but the creditors acquired in addition under that decree a right to payment out of the assets of the Bank of Athens to which the defendant bank succeeded. So far, therefore, as the English creditors of the old National Bank are concerned no question of detriment arises as an obstacle to our recognition of the amalgamation.

The position of the English creditors of the Bank of Athens is, of course, different; but it is not before us and we have no information as to those creditors. It is possible that their debts were paid or satisfactorily provided for when the amalgamation was effected. If, however, they had at that time sought the protection of our courts it may well be that their interests would have been safeguarded in the manner suggested by my Lord [Denning L.J.], whose judgment I have had the advantage of reading. It is, however, perhaps enough for me to say that it has not been established in these proceedings that the amalgamation was necessarily detrimental to the English

---

[11] L.R. 2 P.C. 193, 203.

C. A.
1957

Metliss
v.
National
Bank of
Greece and
Athens S.A.

Romer L.J.

creditors of the old Bank of Athens and their position in the matter can, in my opinion, be disregarded.

In my judgment, therefore, the plaintiff is entitled to succeed in the claim which he has brought against the defendant company; for the decree created a statutory universal succession of a kind which our courts will recognize, and the liability on which the plaintiff sues is an incident of that succession which is favourable to the English creditors of the former National Bank of Greece.

As to the defendant bank's second point, there is really nothing that I can add to my Lord's rejection of it. The defendant company took over the whole of the liabilities of the former National Bank, and not merely those which could only be enforced in Greece. It became, of course, entitled to the same protection under the moratorium as the old bank had formerly enjoyed and could not therefore be sued in Greece. The moratorium, however, never afforded protection against proceedings in this country, and in that respect the defendant company cannot be in any better position than was its predecessor. For the above reasons, I agree that the appeal must be dismissed.

Parker L.J. I have come to the same conclusion. The first point taken before this court is that the defendants, the new bank, are not liable on the guarantee since they are not parties to it, and it is not suggested that there has been a novation. The plaintiff relies solely on a Greek decree whereby the entire assets and liabilities of the National Bank of Greece, the original guarantors, were transferred to the defendants, and such a transfer, it is contended, will not be recognized by our courts.

Now the law of Greece has adopted the conception of "universal succession" as developed in Roman law. Under this conception a new person or entity continues the personality of another. All the rights and liabilities of the former are automatically transferred to and vested in the latter. The new person or entity succeeds "per universitatem" and not by a series of particular acts to each item of property. Thus, under many Continental systems of law which adopt this conception, two persons on marriage succeed in the absence of special contract to the goods of the other. "The spouses become co-owners "of the whole without any act of transfer such as conveyance, "registration, or assignment, by the mere fact of marriage, uno "actu. The acquisition is similar to the 'universal succession' "upon death. The 'couple' succeeds the husband, the 'couple' "succeeds the wife": see Martin Wolff, Private International Law (2nd ed., p. 357). Again, an heir who takes "without "benefit of inventory" succeeds to the assets and liabilities of the deceased and becomes personally liable for the deceased's liabilities regardless of the value of the assets. Further, in many systems of law, a trustee in bankruptcy succeeds in the same way to all the assets of the bankrupt. Similarly, under the relevant Greek law the new bank is "substituted, ipso jure and without "any other formality, in all rights and obligations of the "amalgamated banks, as their universal successor."

The question in issue is whether the English courts should recognize this law as vesting the liabilities of the amalgamated banks in the new bank. There is no doubt that the English courts recognize the law of the country of domicile as governing the status of a person and the law of the country of incorporation as governing the status of a body of persons. In the case of a corporation that is the law by which the creation and dissolution are governed, and our courts will look to that law to "find out what this statutory creature is and what it is meant "to do; and to find out what this statutory creature is you must "look at the statute only, because there, and there alone, is "found the definition of this new creature." These are the words of Bowen L.J. in reference to the English company in *Baroness Wenlock* v. *River Dee Co.*[12]

Accordingly, it is clear that we recognize the existence of the new bank; but the more difficult question is whether we should also recognize its succession to the assets and liabilities of the old bank. Though no evidence was given as to the respective assets and liabilities of the amalgamated banks in this country, it may well be that, whereas both had liabilities, only one, the Bank of Athens, had assets here. If that were the case, then, if the total assets here were insufficient to pay off the liabilities of both the old banks, the creditors of the Bank of Athens would be prejudiced, whereas the creditors of the National Bank of Greece would gain an advantage. Looked at in this way, it could be contended that no transfer of assets and liabilities in this country should be recognized, and that the respective creditors should be left to wind up the old banks and to obtain payment or a dividend in the liquidations as in the case of the Russian banks. In the case of the Russian banks, however, the foreign legislation purported to confiscate the assets here to the prejudice of all English creditors, whereas on the assumptions made above in the present case the English creditors as a whole are in no way prejudiced, and the foreign legislation is in no sense confiscatory. In any event, the point does not arise here since there is no evidence that any English creditors have been prejudiced.

---

[12] (1887) 36 Ch.D. 674, 685n.; 3 T.L.R. 814.

I have come to the conclusion that we should recognize this transfer of assets and liabilities. Not only does the balance of convenience suggest that result, but it seems to me that such authority as there is points that way. Thus the English courts recognize the transfer of assets to husband and wife on marriage where by the law of the country of the matrimonial domicile there is, in the absence of contract, a "universal succession" by the couple to the goods of each spouse. As Lord Lindley said in *In re Martin, Loustalan* v. *Loustalan*[13]: "It is not necessary "to cite authorities to show that it is now settled that, according "to international law as understood and administered in "England, the effect of marriage on the movable property of "spouses depends (in the absence of any contract) on the "domicil of the husband in the English sense." Again, a foreign heir who elects to succeed "without benefit of inventory" could, it seems, if he came within the jurisdiction, be sued here by English creditors for payment in full of any debts irrespective of the amount of the assets: Dicey's Conflict of Laws (6th ed., p. 459) cites *Beavan* v. *Lord Hastings*[14] for this proposition, and I think rightly. It is true that the action against the heir in equity failed since the latter had not rendered himself accountable as an executor de son tort, but the Vice-Chancellor clearly took the view that an action at law would lie.

It is, of course, true that a foreign administrator cannot sue or be sued here in that capacity. His status as an administrator is not recognized here and he must take out an English grant. There is, however, good reason for this. Not only is he not a "universal successor" but it is necessary to see that the rights of English creditors as a whole are safeguarded and that duties are paid.

Again, "An assignment of a bankrupt's property to the "representative of his creditors under the bankruptcy law of "any foreign country, to whose jurisdiction he is properly "subject, whether the bankrupt is domiciled there or not, is or "operates as an assignment of the movables of the bankrupt "situate in England": see Dicey, Rule 99 (6th ed., p. 440), and

---

[13] [1900] P. 211, 233; 16 T.L.R. 354.

[14] 2 K. & J. 724.

C. A.
1957

METLISS
v.
NATIONAL
BANK OF
GREECE AND
ATHENS S.A.

Parker L.J.

Bergerem v. *Marsh.*[15] This is, however, subject to the proviso that the foreign law enables the English creditors to share all the assets equally with the foreign creditors.

Finally, I am influenced in coming to this conclusion because, as it seems to me, our legislation has in effect adopted the conception of "universal succession" in section 208 of the Companies Act, 1948. Thus, when an amalgamation of two companies is sanctioned by the court and the order provides for the transfer of property or liabilities, then by subsection (2) "that property shall, by virtue of the order, be transferred to "and vest in, and those liabilities shall, by virtue of the order, "be transferred to and become the liabilities of, the transferee "company." The property and liabilities there referred to are plainly intended to include property and liabilities abroad. It is true that creditors can object, but if they do not I should expect the foreign courts to recognize the transfer.

The second point taken is an alternative. If the English courts recognize the Greek law transferring the liabilities then, it is said, they should also recognize the Greek laws suspending the liability under the guarantee. The plaintiff cannot, it is said, rely in part on Greek law and reject the rest. Alternatively, it is said that on a true interpretation of the Greek decree effecting the amalgamation only those liabilities are transferred which are not contrary to the public policy of Greece. To transfer a liability to pay an English bondholder would be to transfer something which was illegal by Greek law and contrary to the public policy of Greece. These arguments, however, on analysis are not, in my opinion, valid arguments. The application of the foreign law to status does not involve applying the foreign law as to obligations. What was transferred was the liability under the guarantee, whatever it might from time to time be. If the old National Bank of Greece was liable to be sued in England, as it was, so could the new bank. Further there is no room for any implication cutting down the type of liability transferred—indeed, any such limitation would be inconsistent with the conception of "universal succession" on which the defendants must rely to obtain the foreign assets. Accordingly, I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Stibbard, Gibson & Co.; Hardman, Phillips & Mann.*

M. M. H.

---

[15] (1921) 6 B. & C.R. 195.

JONES *v.* NATIONAL COAL BOARD.

[1953 J. No. 136.]

C. A.

1957
Feb. 26,
27, 28;
Mar. 1, 25.

Denning,
Romer and
Parker L.JJ.

Judge—Conduct of—Evidence of witnesses—Interventions by judge—Roles of judge and advocate.

Mines and Minerals—Coal—Breach of statutory duty—"Reasonably "practicable to avoid breach"—Test of liability at common law—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 49, 102 (8).

The judge's part when evidence is being given is to hearken to it, asking questions of witnesses only when it is necessary to clear up a point; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points made by the advocates and can assess their worth; and at the end to make up his mind where the truth lies. Though a judge is entitled and bound to intervene at any stage of a witness's evidence to understand the nature of the evidence, such intervention should be as infrequent as possible during cross-examination, for the very gist of cross-examination lies in the unbroken sequence of question and answer.

A coalminer working at the coal face was killed by a fall of roof. Some weeks before the accident there had been a previous fall at that point and conditions had not been completely restored to normal. The widow brought an action for damages against the National Coal Board alleging, inter alia, breaches of statutory duty under section 49 of the Coal Mines Act, 1911,[1] and rules made thereunder, and also negligence at common law, in that the board, by using props and not using chocks, had failed to take proper steps to support the place where the dead man had been working. The board denied liability and in turn relied on section 102 (8) of the Act of 1911 [1] to excuse them from liability for the alleged breaches of statutory duty.

At the trial of the action the trial judge intervened during the evidence for the plaintiff in order to understand the technicalities. During the evidence for the defendant board the judge intervened frequently, both during examination-in-chief and during cross-examination, at times conducting the examination of a witness himself, at times interrupting cross-examination to protect a witness against questions which he considered misleading, the nature and extent of his interventions being such as to break the sequence of question and answer. On the issue of chocks in particular the judge in effect stopped cross-examination. He gave judgment for the board on all the matters in issue.

---

[1] Coal Mines Act, 1911, s. 49: "The roof and sides of every travelling road and working place shall "be made secure, and a person shall "not, unless appointed for the purpose of exploring or repairing, "travel on or work in any travelling "road or working place which is not "so made secure. . . ."

S. 102: "(8) The owner of a mine "shall not be liable to an action for "damages as for breach of statutory "duty in respect of any contravention "of or non-compliance with any of "the provisions of this Act if it is "shown that it was not reasonably "practicable to avoid or prevent the "breach."

The plaintiff appealed against that decision on the ground, inter alia, that she had not had a fair trial. After the issues as to liability had been fully canvassed on the basis of the transcript of the evidence, the documents, and the relevant statutory provisions and authorities, the board sought and obtained leave to give notice of cross-appeal on the same ground, namely, that there had not been a fair trial:—

Held that, though the judge was actuated by the best of motives, his interventions taken together were excessive and ill-timed, with the result that not sufficient primary facts had been elicited to enable the appellate court to determine the issues as to liability; and that there must therefore be a new trial.

Roles of judge and advocate considered.

Per curiam. The dearth of evidence on the issue of common law negligence, attributable to the judge's interventions, made it impossible for the court to decide whether the board were excused from liability under section 102 (8); for if the board were exempt from liability at common law, they would also be exempt from liability under section 102 (8).

Appeal from Hallett J.

On January 21, 1953, a coal miner, Emlyn Jones, was working at a coal face over half a mile below ground at the Llay Main Colliery, Wrexham, owned and occupied by the defendants, the National Coal Board, when he was buried by a fall of roof and died as a result. The seam on which he was working was five feet six inches thick. The face was 125 yards long. It was worked by mechanical cutters, and the coal was taken away on a conveyor belt. There were two roads leading to the face, one at each end. As the face moved forward, the space behind (from which coal had been taken) was filled in with packing, but the roadways were kept clear. These roadways had to be made higher than the five feet six inches (the thickness of the seam) and accordingly, as they moved forward, men ripped down the material from the roof above the roadway so as to increase the height. The procedure was for one shift of men to get out the coal from the seam for about eight feet, and for the next shift to rip down the material from above. The place where these rippers worked was called the "ripping." The edge of the material at that place was called the "ripping lip." The roadway up to a point 10 yards from the face was called the "road." The last 10 yards was called the "roadhead."

Some six or seven weeks before Emlyn Jones was killed there had been a previous fall at the roadhead at this point, and conditions had not yet been restored to normal working. The fallen débris had been cleared away and the face (of the coal above) had been dressed down. To fill in the gap from which material had fallen, timber covering was put over the steel arches. In addition, four rails, each nine feet long, had been forepoled into the top of the coal seam, so that five feet of each was embedded in the seam, leaving four feet outside. The outer ends of these four rails were supported on a rolled steel joist, which was itself supported on three wooden props about five feet high. The space above the rails was also filled with timber. In this way it was believed that the place had been made secure from any further fall downwards or outbye.

The next step, in order to get back to normal working, was to get out the coal so as to make a normal roadhead again. The whole area was known to be " tender " because of the previous fall, and the wet condition of the strata above the coal. It was unwise, therefore, to make a frontal attack on the face from the roadhead, but better to make a flank attack by working from the side by hand. That was the work on which Emlyn Jones and his mate were about to engage on the morning of his death. Previous shifts had made some progress in this flank attack, and had got out coal from the space underneath two of the rails. Emlyn Jones had just come on the work, and he and his mates were preparing to get more coal when a large fall occurred, completely burying them, and Emlyn Jones was killed. Afterwards the surveyor found that the rolled steel joist was still in position, but the rails had broken.

The widow of the dead man, Mrs. Mary Myfanwy Jones, as administratrix of his estate, brought an action against the board under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, claiming damages and alleging, inter alia, (1) that the board had been in breach of section 49 of the Coal Mines Act, 1911; (2) that they had been in breach of regulation 6 (2) of the Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.R. & O., 1947, No. 973), which provides that " when there are any roof rippings within the " roadhead, a bar or bars shall be set as near as practicable to " each ripping lip extending across the whole width of the " ripping "; and (3) that they had been guilty of negligence at common law in that they had by using posts and not using chocks failed to take proper steps to support the place at which the dead

C. A.
1957
Jones
v.
National
Coal
Board

man had been working. The board denied negligence, and, on the alleged breaches of statutory duty, relied, inter alia, on section 102 (8) of the Act of 1911 as excusing them from liability for damages "if it is shown that it was not reasonably practicable "to avoid or prevent the breach."

On July 13, 1956, Hallett J., at Chester Assizes, gave judgment for the board, holding, on the basis of the decision in *Walsh* v. *National Coal Board*,[2] that section 49 did not apply to protect the dead man, since though he was cutting coal at the coal face he was still repairing the results of the previous fall; his Lordship also held that the rules did not apply because there was at this place no roadhead and no ripping within the definitions; and that section 102 (8) would avail the board to excuse them from liability on the claim for breaches of statutory duty.

The judge also dismissed the claim alleging negligence at common law, holding that it would not have been good mining practice to use chocks in the particular circumstances at the place where the accident had occurred.

The plaintiff appealed on each of the issues as to liability, and also on the ground that the nature and extent of the judge's interruptions during the trial had been such as to render it impossible for her counsel to put her case properly or adequately or to cross-examine the defendants' witnesses adequately or effectively. On the fourth day of the hearing of the appeal, after submissions on the issues as to liability had been made in extenso by counsel for both parties, counsel for the board sought and obtained the leave of the court to give notice of cross-appeal on the same ground, namely, that the extent of the judge's interruptions had prevented the board from having a fair trial.

Note.—The conduct of the trial is set out in detail and commented on in the judgment of the court.

[*Note.*—The submissions are limited to the only matter on which the court based their decision, namely, the effect of the judge's interventions.]

Gerald Gardiner Q.C. and *W. L. Mars-Jones* for the plaintiff. The plaintiff appeals also on the ground that she did not have a fair trial, owing to the nature and extent of the judge's interruptions. Plaintiff's counsel was prevented from putting her case properly and also from properly challenging the case of the defendants. In particular, counsel for the plaintiff was not permitted to cross-examine the expert witnesses called for the defendants adequately or effectively. One of the most difficult functions of counsel is cross-examination of an expert in technical matters, for unless it is possible to have a run of question and answer it is not possible to obtain really useful admissions. When there are interruptions from the bench, not only has counsel to meet those interventions but they give the expert witness time to think out an answer. Moreover, such interventions may also divert counsel from a preconceived line of inquiry. No member of the bar would question the absolute right of a judge to ask questions to clear up doubtful points, particularly in a technical case, and there is no point in calling technical evidence if the judge does not follow it; but if the judge's views are expressed too early and too frequently it is bound to have an effect on subsequent evidence. It is a question of degree, but counsel cannot discharge his duty to his client unless he can ask questions in sequence.

---

[2] [1956] 1 Q.B. 511; [1955] 3 All E.R. 632.

[ROMER L.J. Were there in the present case similar interruptions during the examination-in-chief of the board's witnesses?]

The interventions were of the same order, save that it does appear that during cross-examination the judge intervened to address to the board's witnesses warning words such as "You "must be careful what you are saying?" or "You don't mean "that?" In substance the judge conducted the trial on both sides, but apparently evinced at an early stage a strong provisional view in favour of the board. It is conceded that he had expected the case to last less long than it did, but there is unfortunately only one reason for its length, as the transcript of the evidence clearly shows.

Edmund Davies Q.C. and *H. Emlyn Hooson* for the board. The judge's conclusions on liability were right and inevitable. That has a direct bearing on the validity of the ground of appeal that the plaintiff was denied a fair trial. Unless it can be said that an injustice resulted from the judge's interventions the court should not concede a new trial. There are judges who ignore the advice of Palles C.B. that "the judge who opens his "mouth closes his mind," but this judge could not be accused of closing his mind; on the contrary, with his keen mind, his passion for the law and his passion for exploring a point to its last position, it cannot be said that by his intervention he has prevented the investigation of the whole of the plaintiff's case on each of the issues raised. The judge displayed a complete grasp of the evidence, gave effect to the considerations which emerged, and his judgment, extempore though it was, was a masterpiece both on the facts and the law.

[DENNING L.J. Do you say that if the inevitable result would have been the same this ground of appeal is not one on which this court should take any action? How can the court decide that? May it not depend on the scope of the evidence?]

If the court is of opinion that as a result of the judge's interventions a fair trial was not had for the plaintiff in the court below, it must follow that a fair trial was not had for either side, for the judge's interventions during the examination-in-chief and re-examination of the defendants' witnesses were co-extensive with those during cross-examination, as has been conceded. If this court were minded to allow the plaintiff's appeal on liability at common law, there would be a rankling feeling of injustice on the part of the board that the appeal had been allowed on a ground which had ex hypothesi never been canvassed because of the nature and extent of the judge's interventions. The duty of the court in such circumstances would be to order a new trial without more, and state that there would be no decision on the points as to liability. That will require the board to obtain the leave of the court to enter a notice of cross-appeal on the ground that the nature and extent of the judge's interventions were such as to preclude the board from adequately presenting their defence.

[THE COURT intimated that leave to enter such a notice would be granted.]

Gardiner Q.C. in reply. The court is in a position to decide on the material before it that the board were in breach of section 49 of the Act of 1911 and have not discharged the onus on them of proving that it was not reasonably practicable to secure the roof. It is only in the alternative that a new trial is asked for, for a new trial will involve hardship for the plaintiff.

The following cases, relevant only on the issues of liability, were cited during argument: *Walsh* v. *National Coal Board* [2]; *Carr* v. *Mercantile Produce Co. Ltd.* [3]; *Caulfield* v. *P. W. Pickup Ltd.* [4]; *Edwards* v. *National Coal Board.* [5]

Cur. adv. vult.

---

[2] [1956] 1 Q.B. 511; [1955] 3 All E.R. 632.

[3] [1949] 2 K.B. 601; 65 T.L.R. 503; [1949] 2 All E.R. 531.

[4] [1941] 2 All E.R. 510.

[5] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.

March 25. DENNING L.J. read the following judgment of the court, saying that the case had given rise to complicated issues of fact and law. His Lordship stated the facts as set out above, and commented that the fact that, after the accident, the rolled steel joist was still in position, but the rails had broken, seemed to show that the steps taken to secure the place outwards from the previous fall had been successful, but that those taken to secure the newly exposed roof were not sufficient. Having referred to the contentions of the parties on the issues of liability he continued: Mr. Gardiner took a further ground of appeal which is stated in the notice of appeal to be "that the nature and "extent of the judge's interruptions during the hearing of the "evidence called on behalf of the defendants made it virtually "impossible for counsel for the plaintiff to put the plaintiff's "case properly or adequately or to cross-examine the witnesses "called on behalf of the defendants adequately or effectively." Furthermore, Mr. Edmund Davies said that, in case there was any chance of our being persuaded that Mr. Gardiner's three points on liability were correct, he wished himself to give a cross-notice of appeal in similar terms complaining that the judge's interruptions prevented him from properly putting his case. We gave him leave to give a cross-notice to this effect.

We much regret that it has fallen to our lot to consider such a complaint against one of Her Majesty's judges: but consider it we must, because we can only do justice between these parties if we are satisfied that the primary facts have been properly found by the judge on a fair trial between the parties. Once we have the primary facts fairly found, we are in as good a position as the judge to draw inferences or conclusions from those facts, but we cannot embark on this task unless the foundation of primary facts is secure.

In order to consider the complaint we must state the course of the trial. Mr. Mars-Jones appeared for the plaintiff, and opened the case for her. He relied on section 49 of the Act of 1911, and said it was the duty of the board to make the roof secure, and that the fall showed that they had not done it. In case that approach was wrong, he relied on the Support Rules and on the common law, and he made several specific criticisms in which he said that the board had failed to do what they ought to have done. He called the widow to give evidence on damages, and then an expert, William Charles Davies. This expert had not been down the mine, but he relied on a plan which had been made by the board's surveyor shortly after the accident. This enabled him to make criticisms on the same lines as those opened by Mr. Mars-Jones. The judge intervened on several occasions during the examination-in-chief of that expert, and also his cross-examination, but this was in order to enable him to understand the technical points of the case, and cannot properly be made the subject of complaint. Mr. Mars-Jones then closed his case.

Mr. Edmund Davies, who appeared for the National Coal Board, then called John Kerr, the manager of the Llay Main Colliery at the time of the accident. He had inspected the spot on January 19, 1953, two days before the roof fell. He had been accompanied on that occasion by an inspector of mines, who made no complaint of the manner in which the work was being done. The manager explained to the judge exactly what was being done to support the roof, and the judge, naturally enough, intervened from time to time to see that he understood. Then Mr. Edmund Davies began to ask the manager to deal with the criticisms which had been made by Mr. Mars-Jones, and by his expert witness, W. C. Davies. Now, when this happened the judge, we fear, intervened far too much. He had himself made a note of the criticisms and, in his anxiety to understand the manager's replies to these criticisms, he took the examination of the witness out of the hands of leading counsel for the rest of that day and of his junior counsel next morning. Mr. Mars-Jones then cross-examined the witness; but during the cross-examination the judge intervened on several occasions to protect the witness from what he thought was a misleading question, and to bring out points in favour of the witness's point of view.

Next, Mr. Edmund Davies called Thomas George Davies. He was the deputy who was actually on duty on January 21, 1953, when the accident occurred. He said that he thought that the roof was secure, and that he had told the deceased workman and his mate to get the remainder of the coal off, and try to get another rolled steel joist up at this point. His examination-in-chief proceeded on normal lines; but during Mr. Mars-Jones's cross-examination the judge seemed to be afraid that he was being misled, intervened at considerable length, and in effect stopped his cross-examination on the important point of chocks. When Mr. Edmund Davies re-examined, the judge cut him short, saying: "This is what has been given again and again."

Then Mr. Edmund Davies called the surveyor, Philip Edgar Roberts, who made the plan. Nothing untoward occurred in his short evidence. Finally, Mr. Edmund Davies called Cecil Henry Bates, an expert consultant mining engineer. We are afraid that the judge took the examination-in-chief largely out of the hands of Mr. Edmund Davies. He took the points of criticism made against the defendants, went through them with the witness, and appeared to accept his explanations. Mr. Mars-Jones cross-examined the witness, but after a while the judge disclosed much impatience with him and he brought it to a close.

No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence, he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases, and have done for centuries.

Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon L.C. who said in a notable passage that "truth is best discovered by powerful "statements on both sides of the question"?: see *Ex parte Lloyd.*[1] And Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and "is liable to have his vision clouded by the dust of conflict": see *Yuill* v. *Yuill.*[2]

---

[1] (1822) Mont. 70, 72n.

[2] [1945] P. 15, 20; 61 T.L.R. 176; [1945] 1 All E.R. 183.

Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales—the "nicely calculated less or more"—but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties: see *In re Enoch & Zaretzky, Bock & Co.*[3] So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other: see *Rex* v. *Cain*,[4] *Rex* v. *Bateman*,[5] and *Harris* v. *Harris*,[6] by Birkett L.J. especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see *Reg.* v. *Clewer*.[7] The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that[8]: "Patience and gravity "of hearing is an essential part of justice; and an over-speaking "judge is no well-tuned cymbal."

Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice, our keenness may outrun our sureness, and we may trip and fall. That is what has happened here. A judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties—nay, each of them—has come away complaining that he was not able properly to put his case; and these complaints are, we think, justified.

---

[3] [1910] 1 K.B. 327.

[4] (1936) 25 Cr.App.R. 204.

[5] (1946) 31 Cr.App.R. 106.

[6] The Times, Apr. 9, 1952; Judgments of the Court of Appeal, 1952, No. 148.

[7] (1953) 37 Cr.App.R. 37.

[8] Essays or Counsels Civil and Moral. Of Judicature.

We have sufficiently indicated the nature of the interventions already, but there is one matter which we would specially mention. Mr. Gardiner made particular complaint of the interference by the judge during the cross-examination of the defendants' witnesses by Mr. Mars-Jones. Now, it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return. Mr. Gardiner submitted that the extent of the judge's interruptions was such that Mr. Mars-Jones was unduly hampered in his task of probing and testing the evidence which the defendants' witnesses gave. We are reluctantly constrained to hold that this submission is well founded. It appears to us that the interventions by the judge while Mr. Mars-Jones was cross-examining went far beyond what was required to enable the judge to follow the witnesses' evidence and on occasion took the form of initiating discussions with counsel on questions of law; further, and all too frequently, the judge interrupted in the middle of a witness's answer to a question, or even before the witness had started to answer at all. In our view it is at least possible that the constant interruptions to which Mr. Mars-Jones was subjected from the bench may well have prevented him from eliciting from the defendants' witnesses answers which would have been helpful to the plaintiff's case, and correspondingly damaging to that of the defendants.

The judge seems to have been under the impression on occasions that Mr. Mars-Jones was asking a misleading question. We do not gain that impression ourselves. It seems to us that the case was conducted by counsel on both sides with complete propriety.

Mr. Edmund Davies asked us to say that the decision reached by the judge was the inevitable decision, but we cannot say that. We have not the material for the purpose. We have some of the primary facts, but not all of those necessary to a decision. We have an adequate description of the state of affairs in this mine before and after the first fall, and before and after the second fall; but we have not sufficient evidence to be sure whether further precautions might not have been taken to avoid the accident. It seems to us that the widow made a strong case which calls for an answer. She showed that in the middle of December there was a big fall of roof at the roadhead notwithstanding that all the Support Rules were observed, and every normal precaution was taken. The fall disclosed a dangerous condition of the strata at this point. Seven weeks later her husband was killed by a second fall at near enough the self-same place by the self-same danger. Her counsel makes on her behalf this strong plea: "If this known danger could have "been avoided by taking extraordinary precautions, why did the "board not take those precautions? If the danger could not be "avoided by any known precautions, why was her husband sent "to work there? Better stop getting coal at that point than "send him to his death." The board made answer: "We put "up many more props than usual." The widow's counsel says: "Why did not you use chocks instead of props? You know "chocks give much better support than props." The board answer: "We know that it is most desirable to use chocks "whenever possible, but we could not get them in." The judge seems to have regarded that as a sufficient answer, though there is little doubt that chocks could have been used if the conveyor belt had been shortened. The judge, in his judgment, gave, as part of his reason for accepting the board's answer, his view that it was good mining practice not to use chocks, and that it would have been inconvenient to curtail the conveyor belt. But such considerations carry little, if any, weight when extreme measures for safety are called for. Again, he wrongly assumed that the shortening of the conveyor belt would involve exposing more men to the same risk. We are not saying that the judge was necessarily wrong in accepting the board's answer, but we would like to have more facts before accepting it as sufficient. In the absence of them, we do not think it would be fair to either party to pronounce upon it.

In these circumstances, we think we must grant the widow a new trial. There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. The widow and the National Coal Board stand in this respect on the level. No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.

Mr. Gardiner urged us in any event to give a ruling on the true interpretation of section 49 of the Act and of the Support Rules; but we do not think it desirable so to do. If there was a breach of the section or rules there is still the question under section 102 (8) whether it was reasonably practicable to avoid or prevent the breach. This is closely allied to the issue at common law whether the board took every reasonable precaution that the situation demanded. So close indeed are these issues that we think that, if the board are exempt from liability at common law, they will be exempt under section 102 (8) also; and if they are also liable at common law, there is no need to consider whether they are also liable by statute.

We have come to the conclusion, with much regret, that the only thing we can do in this case is to order a new trial. We allow the appeal accordingly.

Appeal and cross-appeal allowed.
New trial ordered.
Costs of appeal and in the court below reserved to the judge on the new trial.

Solicitors: *Jaques & Co. for Cyril Jones, Son & Williams, Wrexham; Donald H. Haslam for P. E. Lissant, Manchester.*

M. M. H.

C. A.

1957
Feb. 11, 12;
Mar. 13.

Lord Evershed M.R., Morris and Ormerod L.JJ.

CHIVERS & SONS LTD. *v.* CAMBRIDGE COUNTY COUNCIL.

TRUSTEES OF THE NATIONAL INSTITUTE OF AGRICULTURAL BOTANY REGISTERED *v.* CAMBRIDGE COUNTY COUNCIL.

Justices—Case stated—Quarter Sessions—Inferences from facts found by quarter sessions—No error in law—Intention to dedicate footpath — Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 25*—National Parks and Access to the Countryside Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 97), *s.* 31 (7).
Highway—Case stated.

The Cambridge County Council prepared a provisional map in accordance with the requirements of the National Parks and Access to the Countryside Act, 1949, on which was shown a public footpath running from one highway to another across the land of the two applicants. The applicants applied under section 31 (7) of the Act of 1949 to quarter sessions for a declaration that at the relevant date there was no public right of way over the footpath in question. Quarter sessions found that the footpath had been dedicated as a highway at common law at some time before 1899, and stated a case for the opinion of the court, the points of law being first, whether there was any evidence to support their conclusion; and secondly, whether, on the facts found by them, regarded as a whole, they were entitled in law to hold that there was at the relevant date a public right of way over the footpath. The applicants contended, first, that there was no evidence to support the conclusion that the footpath had been dedicated as a highway; secondly, that, having regard to the provisions of section 25 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] the Divisional Court and the Court of Appeal were as free as quarter sessions to draw inferences of fact and inferences of fact different from those of quarter sessions. The Divisional Court dismissed the applicants' appeal:—

Held, (1) that there was evidence on which quarter sessions could have found dedication.

---

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 25: "(1) Every case stated by a court "of quarter sessions otherwise than "under the Crown Cases Act, 1848, "or the Quarter Sesssions Act, 1849, "for the consideration of the High "Court shall be deemed to be an "appeal, and shall be heard and "determined accordingly.

"(2) On the hearing of an appeal "from a court of quarter sessions the "appellate court may draw any inference of fact which might have "been drawn in the court of quarter "sessions, and may give any judgment or make any order which "ought to have been given or made "by that court, or may remit the "order, and in criminal matters the "conviction with the order, and the "case stated on it, with the opinion "or direction of the appellate court, "for rehearing and determination by "the court of quarter sessions, or may "remit the case for restatement."

(2) That, assuming that the case stated was an "appeal" within section 25 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, only if quarter sessions had been shown to have misdirected itself so as to disable the conclusion which it had reached could the High Court (including the Court of Appeal) draw any inference of fact necessary to reach the proper conclusion by virtue of section 25; and that, accordingly, the question was whether, on the basis of the facts found, quarter sessions were entitled in law to reach their final conclusion, and whether that conclusion proceeding from the unchallengeable findings of "primary" fact could be said to have involved some misdirection or error of law; and that, since the inference of an intention to dedicate did not, per se, involve an error of law, the appeal should be dismissed.

Dicta of Avory J. in *Hickton* v. *Hodgson* (1913) 110 L.T. 380, 383, 384; 78 J.P. 93; 30 T.L.R. 221 and in *Mitchell* v. *Croydon Justices* (1914) 111 L.T. 632, 635; 30 T.L.R. 526 and of Scrutton L.J. in *Bailey* (*Revenue Officer*) v. *Potteries Electric Traction Co. Ltd.* [1931] 1 K.B. 385, 481; 46 T.L.R. 601 applied.

Dictum of Denning L.J. in *British Launderers' Research Association* v. *Borough of Hendon Rating Authority* [1949] 1 K.B. 462, 471, 472; 65 T.L.R. 103; [1949] 1 All E.R. 21, 25 considered.

Decision of the Divisional Court affirmed.

APPEALS from the Divisional Court on cases stated by the Cambridgeshire Quarter Sessions.

These two appeals related to the same footpath which ran across land owned by the first appellants, Chivers & Sons Ltd., and then across land owned by the second appellants, the Trustees of the National Institute of Agricultural Botany Registered. The two cases were heard together by the Divisional Court and also by the Court of Appeal.

The following statement of fact is taken from the judgment of the court.

Pursuant to their duties under the National Parks and Access to the Countryside Act, 1949, the respondents, the Cambridge County Council, carried out a survey of lands in their area over which rights of way were alleged to subsist. They prepared a provisional map and statement which they published on February 1, 1955. The map showed a path which ran from Cambridge Road to Huntingdon Road on the north-west side of the City of Cambridge. The path lay in part across certain land known as Nos. 293, 235, 234 and 211 on the Ordnance Survey Map for the County of Cambridge (1926 edition). That land was owned and occupied by the first appellants, Chivers & Sons Ltd. The path also lay in part across land known as No. 214 on the same Ordnance Survey Map, which land was owned and occupied by the second appellants, Trustees of the National Institute of Agricultural Botany Registered. The path was described in the provisional statement as being 1,170 yards in length and to have been created by usage. The "relevant date" mentioned in the provisional statement was October 5, 1952. Both appellants applied to quarter sessions pursuant to section 31 (1) (*a*) of the Act of 1949 for declarations that, at the relevant date mentioned in the provisional statement, there was no public right of way over the land. The applications were heard by the appeal committee of quarter sessions on September 29 and 30, 1955, when the parties were represented by counsel. Quarter sessions, finding "that the respondents had on the evidence satisfied us "that the footpath had been dedicated as a highway at common "law at some time before 1899," refused to make the declarations. The applicants, by notice dated October 5, 1955, requested quarter sessions to state a case pursuant to section 31 (7) of the Act of 1949.[2] Quarter sessions was informed that the point of law on which the appellants wished to have a case stated was whether there was any evidence upon which the court could find as it did. Two questions of law were stated in each of the cases: (1) "Whether there was any evidence to support our said con-"clusion." (2) "Whether on the facts as found by us (being "facts which were proved or admitted) regarded as a whole we "were entitled in law to find that there was at the relevant date "a public right of way over the said land and, if not, what "should be done in the premises."

Quarter sessions found that from the year 1890 until the year 1898 many members of the public used to walk openly and frequently and without interruption over the path, and that the path was unobstructed. In 1899 the then predecessor in title of Chivers & Sons, Ltd. placed an obstruction across the path at a point approximately halfway along its course. There followed a memorial from 26 inhabitants of the district addressed to the chairman of the Chesterton Urban District Council (within whose area part of the path was situate) calling attention to what had happened and asserting that the use of the path had been enjoyed by the general public for many years. Meetings of the Chesterton Urban District Council took place and they requested the Impington Parish Council (within whose area another part of the path was situate) to co-operate in opposing the obstruction. The parish council declined to do so and the Chesterton Urban District Council took no proceedings to enforce a public right of way over the path. Notwithstanding the obstruction, members of the public used, until the year 1916, to walk over the path openly and without interruption. That was done with the knowledge of workmen employed by Chivers & Sons Ltd. or their predecessors in title. In 1916 Chivers & Sons Ltd. placed barbed wire across the path at the point where the obstruction had been placed in 1899: this barbed wire had since remained and had made it impossible for members of the public to walk along the path.

---

[2] National Parks and Access to the Countryside Act, 1949, s. 31: "(7) Section 20 of the Criminal Jus-"tice Act, 1925, (which provides for "appeals to the High Court by way "of case stated on a point of law) "shall with the necessary modifica-"tions apply in relation to applica-"tions under this section."

Criminal Justice Act, 1925, s. 20: "(1) After the determination by a "court of quarter sessions of any "appeal against a conviction by a "court of summary jurisdiction or "the sentence imposed on such a "conviction, either party to the pro-"ceedings may, if dissatisfied with "the determination of the court of "quarter sessions as being erroneous "in point of law, make an applica-"tion in writing to the court of "quarter sessions at any time with-"in seven days after the date of the "determination of the appeal to "have a case stated for the opinion "of the High Court on the point of "law. . . ."

The Divisional Court dismissed the applicants' appeals from quarter sessions.

The applicants appealed.

The decision of the Court of Appeal on the applicants' first contention that there was no evidence to support the conclusion of quarter sessions does not call for report.

G. D. Squibb Q.C. and *David Hirst* for Chivers & Sons Ltd. Quarter sessions should not have found on the facts that this footpath had been dedicated as a highway. The Court of Appeal has jurisdiction under section 25 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, to draw a different inference of fact from that found by quarter sessions. *Reg.* v. *Petrie* [3] shows that whether there has or has not been dedication is an inference from the facts: see also *Turner* v. *Walsh*.[4] *Holloway* v. *Egham Urban District Council* [5] was a case on its facts very similar to the present. *Folkestone Corporation* v. *Brockman* [6] was not a decision of quarter sessions but a decision at petty sessions. [Reference was made to the observations of Lord Dunedin in *Cababé* v. *Walton-on-Thames Urban Council*.[7]] Whether the Court of Appeal can allow the appeal from quarter

---

[3] (1855) 4 E. & B. 737.

[4] (1881) 6 App.Cas. 636.

[5] (1908) 72 J.P. 433.

[6] [1914] A.C. 338; 30 T.L.R. 297.

[7] [1914] A.C. 102, 114.

C. A.
1957

Chivers & Sons Ltd.
v.
Cambridge County Council.

sessions depends on the scope of section 25 (2) of the Judicature Act, 1925, re-enacting section 2 of the Judicature Act of 1894. Section 25 applies here and empowers the court to draw its own inferences from the facts found by quarter sessions. There is a distinction between the primary facts found by quarter sessions and inferences from those facts. This appears from *Bracegirdle* v. *Oxley*.[8] This court is asked to say that the inference of an intention to dedicate drawn from the primary facts was wrong. [Reference was made to *Mitchell* v. *Croydon Justices*,[9] *Davis (D.) & Sons Ltd.* v. *Pontypridd Union Assessment Committee*,[10] *Bailey (Revenue Officer)* v. *Potteries Electric Traction Co. Ltd.*[11] and *Benmax* v. *Austin Motor Co. Ltd.*[12]]

David Hirst, for the trustees of the National Institute of Agricultural Botany Registered, supported the contentions of Chivers & Sons Ltd.

F. Donald McIntyre Q.C. and *W. H. Hughes* for the Cambridge County Council. If the appellants are right, in every case stated from quarter sessions the Divisional Court can be asked to review the facts and substitute its conclusions for those of quarter sessions. That is a startling proposition and not in accordance with the provisions of section 25 of the Act of 1925. All that that section does is to give power to the court to fill in gaps by drawing any necessary inference of fact. The court is asked to say that it ought not to reverse quarter sessions unless its decision is plainly wrong. The decision below was wrong in *Hickton* v. *Hodgson*[13] and in *Davis (D.) & Sons Ltd.* v. *Pontypridd Union Assessment Committee*.[14] There have been only five cases in which the court has exercised the powers conferred by section 25 (2) (formerly section 2 of the Judicature Act of 1894) and upset the findings of quarter sessions. Those were cases where the findings were wrong in principle. That was so in *Bailey (Revenue Officer)* v. *Potteries Electric Traction Co. Ltd.*[15] and in *Mitchell* v. *Croydon Justices*.[16] No question of exercising the powers conferred by section 25 arises unless the decision of quarter sessions was perverse. This is not a case where the court should exercise the powers conferred by that section.

---

[8] [1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126.

[9] (1914) 111 L.T. 632; 30 T.L.R. 526.

[10] (1916) 115 L.T. 259.

[11] [1931] 1 K.B. 385; 46 T.L.R. 601.

[12] [1955] A.C. 370; [1955] 1 All E.R. 326.

[13] (1913) 110 L.T. 380; 78 J.P. 93; 30 T.L.R. 221.

[14] 115 L.T. 259.

[15] [1931] 1 K.B. 385.

[16] 111 L.T. 632.

C. A.
1957

Chivers & Sons Ltd.
v.
Cambridge County Council.

G. D. Squibb Q.C. in reply. The court has power here to draw inferences of fact different from those drawn by quarter sessions and it should do so.

Cur. adv. vult.

March 13. Lord Evershed M.R. read the judgment of the court, in which they stated the facts, held that there was evidence on which quarter sessions could find that there was a public right of way over the footpath in question and continued: The second question raised, though differently worded, may not, when examined, pose any substantially different issue. The wording is: "whether on the facts as found by us (being the aforesaid "facts which were proved or admitted) regarded as a whole we "were entitled in law to find that there was at the relevant date "a public right of way over the said land." This second question can be stated as follows: "On an application of the "law, do the facts 'entitle' us to decide as we did." That is but another way of asking whether the facts as found can support the conclusion reached. Arguments on a somewhat more extended basis were, however, presented to us.

Mr. Squibb and Mr. Hirst based one part of their argument upon the effect of section 25 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925. The establishment by the respondents of their claim to the existence of the alleged public right of footway depends (they said) upon the justification of the inference of dedication, that is, of the intention to dedicate, by the several owners of the way in question; and though, if the inference was properly made by quarter sessions, the legal result would be in accordance with the conclusion reached, the essential intermediate step is not a matter of fact strictly so called—what has been variously called, of "primary" or "fundamental" fact —but inference from the facts; and that by virtue of the section mentioned the Divisional Court and this court, addressing themselves to the legal question posed by the case stated, are as free themselves as were quarter sessions to draw inferences of fact— and particularly are free to draw, at the essential intermediate stage, an inference of fact different from that drawn by quarter sessions. We hope we have fairly stated the argument as it was fully and forcefully presented to us.

Subsection (1) of section 25 of the Act is as follows: "Every "case stated by a court of quarter sessions otherwise than under "the Crown Cases Act, 1848, or the Quarter Sessions Act, 1849, "for the consideration of the High Court shall be deemed to be

C. A.
1957

Chivers & Sons Ltd.
v.
Cambridge County Council.

"an appeal, and shall be heard and determined accordingly." It is conceded that the present case is not within the stated exceptions. The case has been stated pursuant to section 31 (7) of the National Parks and Access to the Countryside Act, 1949, by reference to section 20 of the Criminal Justice Act, 1925. It is, therefore, according to the argument, within the scope of subsection (2) of section 25 of the Judicature Act, which reads: "On the hearing of an appeal from a court of quarter sessions "the appellate court may draw any inference of fact which "might have been drawn in the court of quarter sessions, and "may give any judgment or make any order which ought to "have been given or made by that court, or may remit the "order . . ."

We will assume (without deciding) that the argument is so far right, that the present case is an "appeal" within subsections (1) and (2). Subsection (2) is itself a re-enactment of section 2 of the Judicature Act, 1894, and we were referred to a number of cases under that section, namely, *Dairy Supply Co.* v. *Houghton*[1]; *Hickton* v. *Hodgson*[2]; *Mitchell* v. *Croydon Justices*[3]; *Davis (D.) & Sons Ltd.* v. *Pontypridd Union Assessment Committee*[4] and *Bailey (Revenue Officer)* v. *Potteries Electric Traction Co. Ltd.*[5] Mr. Squibb also drew attention to a passage in the speech of Lord Dunedin in *Cababé* v. *Walton-on-Thames Urban Council*[6] (a case under the Highway Act, 1835) where the noble Lord referred to the fact that appeals from quarter sessions differed from appeals from justices in that (by reason no doubt of section 2 of the Act of 1894) in the former, but not the latter, inferences of fact may be drawn by the appellate courts.

The language in the several judgments in the five cases first above mentioned is not perhaps in all respects entirely easy to reconcile. All that the decided cases establish, in our judgment, upon their facts is that, where a quarter sessions court has been shown to have misdirected itself so as to disable the conclusion which it has reached, then the High Court (and this court) can and will, by virtue of the section, and in order to reach the proper conclusion in the case, draw any necessary inference of fact, that is, an inference which the quarter sessions court did not draw, but should have drawn.

---

[1] (1911) 106 L.T. 220; 28 T.L.R. 94.

[2] (1913) 110 L.T. 380; 78 J.P. 93; 30 T.L.R. 221.

[3] (1914) 111 L.T. 632; 30 T.L.R. 526.

[4] (1916) 115 L.T. 259.

[5] [1931] 1 K.B. 385; 46 T.L.R. 601.

[6] [1914] A.C. 102, 114.

Mr. Squibb was indeed prepared to agree with Mr. McIntyre that the subsection had been correctly interpreted by Avory J. in the second of the cases cited, *Hickton* v. *Hodgson.*[7] The judge there said: "I wish first of all to deal with the point "that was taken under the Judicature Act of 1894. As to that "I go a little farther than my Lord with regard to the effect "of that statute on these appeals from quarter sessions. I do "not at all accept the contention that the provision that this "court may draw any necessary inference entitles this court to "reverse the findings of the quarter sessions upon questions of "fact. I think that it only means that upon the facts which "are either proved or admitted the court may draw any inference necessary to enable it to determine the question of law "which arises upon it, and it is on that view that I propose to "deal with the case which is now before us."

Avory J. repeated this view in the next case, *Mitchell* v. *Croydon Justices*,[8] where he said: "I expressed my views upon "the effect of this statute in the case of *Hickton* v. *Hodgson*,[9] "and I am still of the same mind—namely, that section 2 of the "Act only means that upon the facts which are either proved or "admitted, the court may draw any inference necessary to "enable it to determine the question of law which arises upon "them, but that it does not entitle this court to reverse the "findings of the court of quarter sessions upon questions of fact."

It may be added that Scrutton L.J. in the last of the cases cited, *Bailey (Revenue Officer)* v. *Potteries Electric Traction Co. Ltd.*,[10] approved the view which Avory J. had expressed, when he said: "I agree with the view taken by Avory J. in *Hickton* v. "*Hodgson*,[11] where he says: 'I wish first of all to deal with the "'point that was taken under the Judicature Act, 1894' (Now "1925). 'As to that I go a little farther'"—and then Scrutton L.J. cites the passage which I have already quoted, and continues: "The court can set aside a finding of fact on the ground "that there is no evidence on which such a finding can be made, "or on the ground that the tribunal has proceeded on a wrong "principle of law in the consideration or exclusion of evidence. "It cannot alter a finding of fact found below except on these "grounds."

---

[7] 78 J.P. 93, 95.

[8] 111 L.T. 632, 635.

[9] 78 J.P. 93.

[10] [1931] 1 K.B. 385, 481, 482.

[11] 78 J.P. 93.

Mr. Squibb claimed that this view of the scope of the section sufficed for his purpose and enabled the court to draw an inference of fact opposite to that drawn by quarter sessions as incidental, as it were, to arriving at the final conclusion whether a right in law of public footway had been established. Assuming, as we are for present purposes content to do, that Avory J.'s exposition was correct, we are, however, far from agreeing with Mr. Squibb that it suffices for the purposes of his argument. For as we read Avory J.'s language (in the two cases) it seems to us to do no more than justify the drawing of inferences of fact in order, as it were, to fill the gap left where the conclusion of quarter sessions reached by a route which did not require the relevant inference to be drawn, is shown to have been wrong in law. In other words, Mr. Squibb can at best only invoke Avory J.'s exposition if he first shows or assumes that on some other ground the conclusion in favour of the right of way is, in law, erroneous.

But, in our judgment, Mr. Squibb's argument breaks down at an earlier stage. The relevant question of law submitted by the case stated under the Act of 1949 is, by the terms of the case, "whether on the facts as found by us (being the aforesaid "facts which were proved or admitted) regarded as a whole "we were entitled in law to find that there was at the relevant "date a public right of way . . ." The "facts" there referred to are the facts which Mr. Squibb concedes to be "primary" facts of which the quarter sessions are admittedly the final judges. We have not seen (and are not entitled to see) the evidence actually given. We must, therefore, interpret the findings as meaning what, on the face of it, they plainly say. The question for the court then is, whether on the basis of those facts quarter sessions were entitled in law to reach their final conclusion; that is, not whether they were entitled to draw further inferences of fact, but whether the conclusion proceeding from and founded upon the unchallenged and unchallengeable findings of "primary" fact can be said at some point to have involved some misdirection, some error, of law. An inference of fact properly so called, such as was the implicit inference of dedication or intention to dedicate, and such alone as is contemplated by the subsection under consideration, is not and does not, per se, involve an error of law and is therefore not comprehended by the case as it is stated. We may add that, if the inference of fact in question could be called, or could be shown to involve, an error of law (as we think it cannot), it would be then unnecessary to invoke the terms of section 25 (2) of the Judicature Act of 1925. In any event, therefore, the subsection cannot, in our judgment, in the present case avail Mr. Squibb, and we need not say anything further upon it.

We should perhaps add that Mr. Squibb explained to us that he had not felt able before the Divisional Court to develop his point upon the subsection as he has developed it before us, having regard to certain language of Denning L.J. in *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[12] which Mr. Squibb thought would be regarded as binding the Divisional Court, but the correctness of which he challenged before us.

The passage from Denning L.J.'s judgment is: "On this "point it is important to distinguish between primary facts "and the conclusions from them. Primary facts are facts which "are observed by witnesses and proved by oral testimony or facts "proved by the production of a thing itself, such as original "documents. Their determination is essentially a question of "fact for the tribunal of fact, and the only question of law that "can arise on them is whether there was any evidence to support "the finding. The conclusions from primary facts are, however, "inferences deduced by a process of reasoning from them. If, "and in so far as, those conclusions can as well be drawn by "a layman (properly instructed on the law) as by a lawyer, "they are conclusions of fact for the tribunal of fact: and the "only questions of law which can arise on them are whether "there was a proper direction in point of law; and whether the "conclusion is one which could reasonably be drawn from the "primary facts: see *Bracegirdle* v. *Oxley*.[13] If, and in so far, "however, as the correct conclusion to be drawn from primary "facts requires, for its correctness, determination by a trained "lawyer—as, for instance, because it involves the interpretation "of documents or because the law and the facts cannot be "separated, or because the law on the point cannot properly be "understood or applied except by a trained lawyer—the conclu- "sion is a conclusion of law on which an appellate tribunal is "as competent to form an opinion as the tribunal of first "instance."

It was said that the distinction between inferences which could be drawn by a layman and inferences which required a lawyer's training was unreal and unsound; and that *Bracegirdle*

---

[12] [1949] 1 K.B. 462, 471, 472; 65 T.L.R. 103; [1949] 1 All E.R. 21, 25.

[13] [1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126.

C. A.
1957

CHIVERS & SONS LTD.
v.
CAMBRIDGE COUNTY COUNCIL.

v. *Oxley*[13] cited by Denning L.J. was unhappily chosen since it was one of a case stated by justices.

As the argument has in the end turned out and on the view of this part of the argument which we have formed, we do not find it necessary to express any view upon the validity or general applicability of Denning L.J.'s view; though we must not be taken to be indicating any present disagreement with it.

In our judgment the appeals fail and should be dismissed.

Appeals dismissed.

Solicitors: *Blyth, Dutton, Wright & Bennett for King, Metters & Harrison, and for Few & Kester, Cambridge; Charles Phythian, Clerk to the Cambridge County Council.*

B. A. B.

---

[13] [1947] K.B. 349.

1956
Oct. 16, 19.

Lord Goddard C.J., Hallett and Donovan JJ.

C. A.

1957
Feb. 11, 12, 13;
Mar. 6.

Jenkins, Morris and Sellers L.JJ.

REGINA *v.* INCOME TAX SPECIAL COMMISSIONERS.
Ex parte LINSLEYS (ESTABLISHED 1894) LTD.

Revenue—Profits tax—Investment company—Direction by special commissioners—Computation of company's actual income—Deduction of amount payable by company for profits tax—Whether profits tax "payable" before election—Meaning of "payable"—When tax "falls to be computed"—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 31 (3)—*Whether direction required if nil actual income—"Payable"—Finance Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 33), *s.* 68—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 262.

Revenue—Surtax—Company.

Section 68 (1) of the Finance Act, 1952, provides: "Where "... the actual income from all sources of a body corporate ... "falls to be computed under paragraph 6 of the First Schedule to "the [Finance Act, 1922] or subsection (3) of section 255 of the "[Income Tax Act, 1952], then, if any amount is payable by the "body corporate by way of the profits tax or the excess profits "levy, respectively, for any chargeable accounting period falling "wholly or partly within that year or period, a deduction shall be "allowed, in computing the said actual income, of such an amount "as would, after deduction of income tax at the standard rate in

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

"force for the year of assessment during which the said year or "period ends, be equal to so much of the amount so payable by "the body corporate as is apportionable to the said year or "period . . ."

An investment company, to which section 245 of the Income Tax Act, 1952, applied, required the special commissioners to make a direction pursuant to section 262 of that Act in respect of the company's income for the period April 6 to May 7, 1953. The special commissioners refused to make a direction on the ground that when the actual income of the company was computed, including a deduction for the company's liability to profits tax, a nil sum resulted and that there was no obligation upon them to make a direction of a nil actual income. The Divisional Court ordered mandamus to issue to the special commissioners requiring them to make a direction. The special commissioners appealed:—

Held, (1) that the words "falls to be computed" in section 68 (1) of the Finance Act, 1952, meant "is required by law to be "computed" or "is required by the relevant statutory provisions "to be computed," and no such requirement arose in the case of a company to which section 245 of the Income Tax Act, 1952, applied, whether or not the company was an investment company and thereby also subject to section 262 of that Act, until the special commissioners had made a direction that the income of the company should be deemed to be the income of the members.

(2) That until there had been a direction the profits tax in question was not an amount "payable" within the meaning of section 68 (1), but an amount payable only in the contingency of the right of election under section 31 (3) of the Finance Act, 1947, not being exercised.

(3) That, accordingly, a submission that the company was not an investment company within the meaning of section 262 of the Income Tax Act, 1952, for the relevant period because its income was nil must fail.

Accordingly, the order of mandamus was rightly made.

Per curiam. Even if the question of the deduction of the amount of profits tax fell to be decided before a direction, such an amount was not "payable" within the meaning of section 68 (1) until the right of election under section 31 (3) of the Finance Act, 1952, was exercised or refused.

Dictum of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* [1926] A.C. 37, 52; 42 T.L.R. 58; 10 T.C. 88 and *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.* [1950] A.C. 149; [1950] 1 All E.R. 1; 31 T.C. 274 distinguished.

Decision of Divisional Court affirmed.

APPLICATION for order of mandamus.

During the relevant period, April 6 to May 7, 1953, Linsleys (Established 1894) Ltd., of which the whole income was investment income, was under the control of not more than five persons and section 245 of the Income Tax Act, 1952, applied. Some of its members were individuals. By letter dated September 29, 1954, the company requested the special commissioners to direct that the actual income of the company for the relevant period be apportioned to the members of the company for surtax purposes. The special commissioners refused to make a direction on the ground that the company was liable to profits tax for the chargeable accounting period in a sum (mainly arising from distribution charges on liquidation proceedings) which would, when deducted as required by section 68 of the Finance Act, 1952, result in the company having a nil actual income, and there could be no apportionment of a nil income. The company applied to the Divisional Court for an order of mandamus, contending that such a ground was erroneous since, whether profits tax was payable by the company or not could not be ascertained until an appeal the company had lodged had been decided and until those members of the company so entitled had exercised or refrained from exercising their rights of election, given by section 31 (3) of the Finance Act, 1947, to have such portion of the company's income as was apportioned to them treated for profits tax purposes as if it were their share of the income of a partnership.

Cyril King Q.C. and *H. H. Monroe* for the company. Mandamus is the only remedy available to the applicants. The special commissioners are bound to make a direction that the actual income of the company should be deemed to be the income of the several members of the company and apportioned according to their respective interests in the company. The mandatory word "shall" appears in section 262 (1) of the Income Tax Act, 1952, which governs the procedure. The ground of the special commissioners' refusal to make a direction was that although the company had had an actual income, that actual income was exceeded by the profits tax payable by the company, and by virtue of section 68 (2) of the Finance Act, 1952, the actual income had to be reduced by the amount of profits tax payable, leaving a nil actual income. The commissioners contend that section 262 (1) of the Income Tax Act, 1952, does not require a direction in respect of a nil income. The company submits, however, that the amount of profits tax payable cannot be known until the appeal by the company against the profits tax assessment has been disposed of, or until the company and its members other than individuals have decided whether or not to make their election under section 31 (3) of the Finance Act, 1947, and thereby avoid payment of profits tax by the company. By refusing to make a direction the special commissioners have prevented the members from exercising their right of election, which can follow only upon a direction. It is noteworthy that in the case of investment companies, in contradistinction to the discretion allowed in respect of other companies within the surtax provisions, Parliament has imposed a mandatory duty on the special commissioners under section 262. It is further submitted that even if an actual income is a nil figure there must still be a direction to enable members to exercise their right of election.

Sir Reginald Manningham-Buller Q.C., A.-G., Sir Reginald Hills and *E. B. Stamp* for the Crown. This case must be considered against the background of Parliament's intention to prevent avoidance of liability to surtax: see the introductory words to section 245 of the Income Tax Act, 1952. The duty to make a direction is mandatory only in those cases in which an actual income results after the calculation has been made in accordance with section 255 (3), which requires the permitted deductions to be made for that purpose. If, after the computation is made, there is no income, then there is no duty to direct. The time at which the commissioners must consider whether tax is payable is the time of making the computation. At that stage tax is payable by the body corporate whatever may subsequently happen by way of appeal or election to disturb the calculations.

[DONOVAN J. Is there any specific provision that, if there is a later election, profits tax already paid shall be refunded?]

No. At the time the commissioners were making their calculation the company had appealed against their assessment to tax. At that moment profits tax was payable by the company. The fact that the company has appealed against an assessment does not invalidate the assessment. The whole process of making a direction in respect of a nil actual income is nugatory.

[HALLETT J. If the result of a direction is to enable the provisions of section 31 (2) to come into operation, that would not be nugatory.]

From the point of view of the special commissioners the division of nought is nugatory. The Finance Act imposes a liability which becomes quantified when the assessment is made. That liability cannot be enforced if an appeal is laid, but the amount is nevertheless payable: see the speech of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners*.[1] If the commissioners assumed that the right of election would be exercised and no profits tax would be payable they could apportion, and surtax liability would accrue. If the right of election were not exercised all their calculations and workings would be wrong.

---

[1] [1926] A.C. 37, 50; 134 L.T. 98; (1925) 10 T.C. 88, 110.

Cyril King Q.C. in reply. The language of section 68 leaves in abeyance the question whether profits tax is payable. When the commissioners are making this calculation they should make no assumption one way or the other about the exercise of the right of election. They should simply make a direction and await events. [Reference was also made to *Cockerline (W. H.) & Co.* v. *Inland Revenue Commissioners* [2] and *F. P. H. Finance Trust Ltd. (in liquidation)* v. *Inland Revenue Commissioners.*[3]]

Cur. adv. vult.

Oct. 19. Lord Goddard C.J. Donovan J. will deliver the judgment of the court.

Donovan J. read the following judgment. In this case Mr. King, on behalf of Linsleys (Established 1894) Ltd. (in this judgment called " the company "), moves for a writ of mandamus addressed to the Special Commissioners of Income Tax requiring them to make a direction under the mandatory terms of section 262 of the Income Tax Act, 1952, in respect of the company's income for the period April 6, 1953, to May 7, 1953.

That section is one of a number of provisions designed to prevent the avoidance of surtax through the withholding from distribution of the profits or income of private companies under the control of a few shareholders. The history of this legislation goes back to 1922, since when it has, on various occasions, been made more stringent as the taxpayer discovered new loopholes in it. In particular the legislature in 1936, and again in 1939, singled out what it called " investment companies " for special and drastic treatment. These were companies whose income was derived from property rather than from trading; and the target of these new provisions was, no doubt, the kind of scheme under which a taxpayer transferred all his assets to a limited company and then arranged that the company distributed little or no income in such a way as to make him liable to surtax. In the case of " investment companies " it was provided by section 14 of the Finance Act, 1939, now section 262 of the Income Tax

---

[2] (1930) 47 T.L.R. 13; 16 T.C. 1.

[3] [1944] A.C. 285; 60 T.L.R. 450; [1944] 1 All E.R. 653; 26 T.C. 131.

Act, 1952, that the company's income should suffer surtax however much or however little it had distributed in dividend.

The general plan of this legislation both as regards investment companies and other companies is that the special commissioners first "direct" that the company's income for the period under review be deemed to be the income of the members. The company's income for that period is then computed, and "apportioned" (notionally, of course) among the members according to their interests in the company. The amount so apportioned to any member then becomes his income for surtax purposes: and if he is an individual it is added to his other income and the appropriate surtax is computed. That surtax is payable by the company unless, within a given time, the member elects to pay it himself. (See sections 245, 248 and 249, Income Tax Act, 1952.)

There are various provisions for appeals which are not here in question. There is, however, this distinction between trading companies and "investment companies." In the case of a trading company the initial question for the special commissioners is whether it has distributed a reasonable dividend for the period in question, and the commissioners have a discretion whether to make a "direction" or not. In the case of an "investment company" the commissioners have no such discretion. A direction must be made, however much or however little the company has distributed.

Section 262 (1) of the Income Tax Act, 1952, reproducing section 14 of the Finance Act, 1939, provides: "Subject to the "provisions of this section with respect to companies with estate "or trading income, the whole of the actual income from all "sources, for every year of assessment, of every investment "company to which section 245 of this Act applies shall, how"ever much or however little thereof has been distributed to "its members, be deemed for the purposes of assessment to "surtax to be the income of the members of the company, "and accordingly the special commissioners shall give a direction "under the said section 245 in respect of each year of assessment "in relation to every such company without considering whether "or not the company has distributed a reasonable part of its "said income. (2) The provisions of this chapter shall apply, "with the necessary modifications, in cases in which directions "are given by virtue of subsection (1) of this section as they "apply in cases in which directions are given by virtue of the "last preceding section with respect to a year of assessment."

1956

Regina
v.
Income Tax
Special Commissioners.
Ex parte
Linsleys
(Established
1894) Ltd.

It is this section which the company is asking shall be put into effect. The special commissioners have declined to do so, contending that in the special circumstances of the case they are under no duty to do so.

The explanation of this unusual reversal of roles, where the taxpayer is seeking to be taxed and the taxing authority declines to do so, is this. After going into voluntary liquidation on May 7, 1953, the company made distributions, in the liquidation, of trading profits previously undistributed. These distributions attracted a "distribution charge" under the profits tax legislation to be found in the Finance Act, 1947, s. 30 (3) and s. 35. This distribution charge will be diminished if the company is made liable to surtax as it claims. This will result if the members of the company avail themselves of the provisions of section 31 (3) of the Finance Act, 1947. But this they cannot do, under the terms of that subsection, unless the company's income for the relevant period is made the subject of a "direction" for surtax purposes pursuant to section 262 of the Act of 1952, in which case it would be followed by an "apportionment" of such income among the members. Once that is done, the way is clear for the company and such of its members as are themselves corporate bodies to exercise their rights under section 31 (3) of the Finance Act, 1947, which will have the result already indicated. Hence the present proceedings, which are designed to require the special commissioners to make such a direction and apportionment. Nothing of moment turns on the fact that the company is in liquidation, or that the period involved is the short one, April 6 to May 7, 1953. That period (hereinafter called "the relevant period") is by section 262 (6) deemed to be a "year of assessment" for the purposes of subsection (1) of the section. No question of figures is involved. Nor is it necessary to consider at length the intricate language of section 31 (3) of the Finance Act, 1947, embodying the right of election above referred to. It is sufficient to indicate its broad effect which appears to be this. If, within the elastic time limit allowed by the section, the company and such of its members as are not individuals so elect, then for the period in question the business of the company will be treated as carried on by all the members in partnership. The effect of that will be that the members of the company who are themselves bodies corporate will pay profits tax on their shares of the apportioned income, but those members who are individuals will pay surtax only on their share of such income, measured in each case as the subsection provides.

An additional result is that the company itself will not be liable to profits tax for the relevant period, and presumably the total tax bill for all concerned will be reduced. A condition precedent to this right of election is, however, as already noted, that the company's income for the period "is apportioned" for surtax purposes to its members.

The rival contentions of the parties are these: Mr. King says that the provisions of sections 262 (1) of the Income Tax Act, 1952, are mandatory, and that the special commissioners have wrongfully refused to operate them. He complains that until they do so the right of election under section 31 (3) of the Act of 1947, which Parliament has conferred upon the company and some of its members, cannot be exercised; and that a continued refusal to put section 262 (1) into effect will completely frustrate that right and such cannot have been intended by the legislature.

The Attorney-General argues that in the circumstances of this case the special commissioners are under no duty to make a direction under section 262 (1) and a consequential apportionment, one effect of which will be that the full distribution charges which ought to be paid will not be paid. The reasons advanced by the Attorney-General why the special commissioners are under no obligation to make a direction and apportionment are these:—1. A necessary preliminary to that operation is the computation of the company's actual income from all sources in accordance with the terms of section 255 (3) of the Income Tax Act, 1952. 2. In computing that income, profits tax payable by the company for the relevant period must be deducted under the mandatory provisions of section 68 of the Finance Act, 1952. 3. The amount of the said profits tax is £29,856. 4. When that is deducted, the result is that the actual income from all sources of the company for the relevant period is reduced to nil. 5. There is no obligation to make a direction in regard to non-existent income, and no possibility of "apportioning" nothing. 6. Therefore section 262 (1) imposes no duty upon the special commissioners for the relevant period.

Mr. King's answer is twofold: First, the Attorney-General's conclusion does not follow even if the rest of his argument is right: for the special commissioners are bound by section 262 (1) to "direct" even if the income is nil, and to make an apportionment of nil. We need not decide this question, and content ourselves with saying that we think there are formidable difficulties in the way of the argument. Mr. King's second answer is that the whole of the Crown's case is based upon a misconception,

1956

Regina
v.
Income Tax
Special Commissioners.
Ex parte
Linsleys
(Established
1894) Ltd.

namely, that profits tax for the relevant period is "payable" by the company. He says that this cannot be properly asserted in the existing circumstances.

If Mr. King is right upon this point, it disposes of the case. For if no deduction has to be made in respect of profits tax, the company will admittedly have an actual income from all sources of some £8,900, and a "direction" and "apportionment" of that income can be made.

The Attorney-General contends that profits tax is "payable" within the meaning of section 68 because the distributions made by the company in liquidation attract profits tax under the charge imposed by section 30 (3) of the Finance Act, 1947: and the amount of tax has been particularized by an assessment made upon the company. He quoted and relied upon the words of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* [1] to the effect that liability to tax does not depend upon assessment, but upon the charging provisions of the taxing Act; the assessment merely particularizing the amount payable. He adds that the circumstances of an appeal, and the prospect that later on profits tax may not be payable by the company for this same period, that is, in the event of an election under section 31 (3) of the 1947 Act, is irrelevant. As things stand at the moment, he says profits tax is "payable."

For the company, however, it is said that whether profits tax is "payable" depends upon a consideration of all the relevant provisions of the taxing Act. The charging section may impose a charge, but a later section remove it in particular cases. That in effect, it is argued, is the position here, or may well be. Because if the right of election under section 31 (3) of the Act of 1947 is exercised, no profits tax will be payable by the company for the relevant period. Apart altogether from this, it is argued that the appeal against the profits tax assessment already lodged prevents the tax from being "payable" until the appeal is disposed of. Reference is made in this connexion to paragraph 5 of Part II of the Fifth Schedule to the Finance Act, 1937, which clearly recognizes, by implication, that a taxpayer cannot be made to pay profits tax while it is in dispute and the subject-matter of an appeal.

"Payable" is a word which may bear different meanings according to its context. Here it has to be considered in its context in section 68 of the Act of 1952. By that section the special commissioners are told that "if any amount is payable by

---

[1] [1926] A.C. 37, 50; 134 L.T. 98; (1925) 10 T.C. 88, 110.

"the body corporate by way of the profits tax or the excess profits "levy, . . . a deduction shall be allowed," (see subsection (1)), and subsection (2), which is directly in point here, tells the special commissioners that in the case of an investment company a deduction is to be allowed "in relation to any amount payable by the com- "pany by way of profits tax or the excess profits levy." Bearing in mind that the ultimate purpose is the imposition of surtax liability on the members of the company, under what have been authoritatively called "penal provisions," (see *Thomas Fattorini (Lancashire) Ltd.* v. *Inland Revenue Commissioners* [2]), it seems a little unlikely that Parliament intended that such surtax should be reduced by the deduction of a sum for profits tax which might turn out never to be payable at all.

Subsection (4) of section 68 itself will also seem to throw light on the point. This deals with the case where a deduction has been allowed under section 68 for excess profits levy, which levy is later reduced (as it might have been when that levy was in force) by losses incurred in a subsequent year. An appropriate repayment of the levy previously paid would then be recovered by the company. When that happens, says subsection (4), fresh apportionments shall be made to counteract the excessive deduction. There is no similar provision as regards profits tax: and although that was levied on a different basis, the absence of any provision to correct deductions for profits tax which afterwards turn out to be excessive tends to show that in section 68 the legislature was using the word "payable" in relation to profits tax as connoting a liability ascertained and fixed.

If the word "payable" is construed in this sense, the results are that a direction can be made as section 262 (1) directs, and be followed by a consequential apportionment, since no deduction for profits tax will fall to be made. In addition, the company and its non-individual members will be able to exercise the right of election given by section 31 (3) of the Act of 1947. The untoward result is that some tax will be lost to the Revenue and while that is a relevant consideration, it is not an overriding one on a question of construction. If, on the other hand, the word "payable" is construed as the Revenue wishes, the company and its non-individual members will never be able to exercise an election under section 31 (3) for the period in question.

Bearing all these considerations in mind, we think the better construction is that for which the company contends. In other words, that in the circumstances of this case the special commissioners were not bound under section 68 to make a deduction for profits tax on the footing that it is at present "payable" by the company within the meaning of that section. We think that word connotes a liability to pay which has become ascertained and fixed so far as profits tax is concerned: and that the special commissioners are not bound to treat as "payable" profits tax which is the subject of a pending appeal and which, if the company follows a course allowed it by the law, may never become payable by the company at all. If it were merely an outstanding appeal which created the difficulty, no doubt the special commissioners would merely await its outcome before calculating actual income and making an apportionment.

---

[2] [1942] A.C. 643, 655; [1942] 1 All E.R. 619; 24 T.C. 328.

On the view we take, therefore, a direction under section 262 (1) followed by a consequential apportionment can be made in this case and, having regard to the mandatory terms of that section, must be made. An order of mandamus will accordingly issue.

Application allowed.

The Crown appealed.

Sir Reginald Manningham-Buller Q.C., A.-G., Sir Reginald Hills, E. B. Stamp and *Alan Orr* for the Crown.

Cyril King Q.C. and *H. H. Monroe* for the company.

The respective arguments are set out in the judgment of the court.

The following case, not referred to in the judgment, was cited in argument: *Barron (Inspector of Taxes)* v. *Littman.*[1]

Cur. adv. vult.

March 6, 1957. Jenkins L.J. The judgment I am about to read is the judgment of the court.

This is an appeal by the special commissioners from an order of mandamus made by the Queen's Bench Divisional Court on October 19, 1956, whereby the special commissioners were ordered and commanded to give a direction under sections 245 and 262

---

[1] [1953] A.C. 96; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548; affirming sub nom. *Littman* v. *Barron* [1951] Ch. 993; [1951] 2 T.L.R. 323; [1951] 2 All E.R. 393; 33 T.C. 373, C.A.; reversing [1951] 1 All E.R. 701.

C. A.

1957

REGINA
v.
INCOME TAX
SPECIAL COMMISSIONERS.
Ex parte
LINSLEYS
(ESTABLISHED
1894) LTD.

of the Income Tax Act, 1952, in respect of the period from April 6, 1953, to May 7, 1953 (both dates inclusive), in relation to the applicants (now respondents), Linsleys (Established 1894) Ltd. (hereinafter called "the company"), which went into voluntary liquidation on the latter date.

To begin with a broad statement of the nature of the case, the effect of such a direction (which, according to the company, the special commissioners are bound to make under the mandatory provisions of section 262) would be (a) to make the actual income of the company from all sources for the relevant period apportionable amongst its members for surtax purposes; and (b) to give under the somewhat complicated provisions of section 31 (3) of the Finance Act, 1947, a right of election exercisable jointly by the company and any of its members other than individuals (that is to say, bodies corporate as distinct from natural persons) which if exercised would (to put the matter very shortly) operate to relieve the company from a substantial liability in respect of profits tax, while on the other hand rendering apportionable amongst its members for surtax purposes the income which, but for the election, would have been absorbed by the profits tax.

The case at first sight seems to involve what Donovan J., in delivering the judgment of the Divisional Court, described as an unusual reversal of roles. It must be seldom that taxpayers seek to compel the special commissioners to tax them, and as a general rule the special commissioners need no compulsion in that regard. But the figures are in fact such that the liability in respect of profits tax far exceeds the amount of income which on cancellation of that liability would be apportionable for surtax purposes.

It is vital to the company's contention that the company should be held to be an "investment company" within the meaning of section 262 of the Income Tax Act, 1952, for it is only in relation to companies of that character that the special commissioners are enjoined in mandatory terms to give a direction of the nature sought.

The Attorney-General, for the special commissioners, presented a subsidiary argument to the effect that the company was not at the material time an investment company within the meaning of section 262, but without prejudice to that subsidiary contention we propose to deal with the main arguments in the case on the assumption that it was, reserving for later examination the Attorney-General's submission to the contrary.

The main argument for the special commissioners was to the effect that even if the company was an investment company within the meaning of section 262 at the material time, they are under no statutory duty, and indeed have no power, to give the direction in question, because section 68 (1) of the Finance Act, 1952, requires them, in computing the company's actual income from all sources for the purposes of section 262, to make a deduction in respect of the profits tax liability which when made has the effect of reducing such actual income to a minus quantity. There is thus no income in respect of which any direction or apportionment can be given or made, and the mandatory terms of section 262 of the Income Tax Act, 1952, cannot be construed as obliging the special commissioners to give a direction or make an apportionment in respect of income which amounts to nil, or in other words non-existent income: lex non cogit ad impossibilia. It follows, according to the argument for the special commissioners, that as no direction or apportionment can be given or made, the right of election conferred by section 31 (3) of the Finance Act, 1947, can never be exercisable; for that right of election only arises when there has been a direction and apportionment. Thus the submission made on behalf of the special commissioners would, if accepted, lead inevitably to the conclusion that the liability in respect of profits tax must stand, and is not to be exchanged under the provisions of section 31 (3) of the Finance Act, 1947, for the less onerous liability to surtax which the relief from the liability in respect of profits tax afforded by that subsection would, if applicable, entail.

On the other hand, it is argued for the company that upon the true construction of the relevant legislation and in particular section 68 (1) of the Finance Act, 1952, any deduction in respect of profits tax enjoined by section 68 (1) only falls to be made, at earliest, when a direction has been given; that apart from such deduction there is actual income from all sources of the company for the relevant period in respect of which a direction can, and in view of the mandatory terms of section 262 of the Income Tax Act, 1952, must, be given; and that when a direction has been given and the earliest time at which it may be proper to make any deduction enjoined by section 68 (1) of the Finance Act, 1952, has consequently arrived, the question of deduction must still remain in suspense, inasmuch as section 68 (1) only enjoins the deduction in respect of any amount "payable" by way of profits tax, and the amount here in question does not answer that description, because it is not an amount certainly payable, but an amount which will become payable in one contingency, that is to say, the non-exercise of the right of election conferred by section 31 (3) of the Finance Act, 1947, but which will not become payable in another contingency, that is to say, in the event of such right of election being exercised.

The argument for the company is also put on the more general ground that, apart from the submission made in regard to the necessity of a direction by the special commissioners as a condition precedent to any deduction in respect of profits tax under the provisions of section 68 (1) of the Finance Act, 1952, the amount claimed by the special commissioners to be deductible was not "payable" within the meaning of that subsection, in view of the potential right of election conferred by section 31 (3) of the Finance Act, 1947, which if exercised would prevent it from ever becoming payable, and also in view of a pending appeal by the company against the relevant assessment or assessments to profits tax.

It is further submitted on the company's side, though somewhat faintly, that it is not impossible for the special commissioners to give a direction and make an apportionment in respect of a nil amount of income.

The company also puts forward an argument rather in the nature of a plea ad misericordiam, to the effect that the special commissioners ought not to manipulate the legislation so as to defeat the right of election conferred in clear terms by section 31 (3) of the Finance Act, 1947. This argument may perhaps be regarded as offset by the retort made by Mr. Stamp for the special commissioners to the effect that the broad intention of section 31 (3) of the Finance Act, 1947, and section 68 (1) of the Finance Act, 1952, is to protect persons who suffer surtax under the legislation taxing the undistributed profits of companies from suffering profits tax as well, rather than to enable persons on whom no liability to surtax would otherwise fall to exchange a liability to profits tax for a less onerous liability to surtax.

The decision of the Divisional Court in favour of the company was, as we understand the judgment of the court delivered by Donovan J., founded wholly upon the view that the amount of profits tax in respect of which the special commissioners claimed to make the deduction prescribed by section 68 (1) of the Finance Act, 1952, was not "payable" within the meaning of that subsection, in view of the right of election conferred by section 31 (3) of the Finance Act, 1947. We may note that without deciding the point the judgment of the court expressed the opinion that there were "formidable difficulties" in the way of the argument submitted by Mr. King for the company to the effect that the special commissioners were bound to "direct" even if the income was nil, and to make an apportionment of nil.

We hope that this outline of the nature of the case, in which we have referred in general terms to the more relevant statutory provisions, will aid appreciation of the bearing upon the question to be decided of the various enactments to which we must next refer in some detail.

The law relating to surtax on the undistributed profits of companies was consolidated by the Income Tax Act, 1952, and accordingly the earlier enactments so consolidated require no more than a brief reference.

As is well known, this line of legislation began with section 21 of the Finance Act, 1922, which may perhaps be described as the ancestor of section 245 of the Income Tax Act, 1952. The short effect of subsection (1) of the former section was to empower (not enjoin) the special commissioners, where it appeared to them that a company to which the section applied (defined by subsection (6), so far as material for the present purpose, as any company under the control of not more than five persons) had not distributed a reasonable part of its income in such a way as to make it part of the income of the members for surtax (or as it was then, supertax) purposes, to direct that the income of the company should for those purposes be deemed to be income of the members and the amount thereof should be apportioned among the members.

Section 20 of the Finance Act, 1936, singled out for special treatment companies termed "investment companies," and therein defined as companies whose income consisted mainly of "investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in subsection (3) of section 14 of the Income Tax Act, 1918."

Section 14 (1) of the Finance Act, 1939 (which may perhaps be described as the ancestor of section 262 (1) of the Income Tax Act, 1952), introduced a system of automatic direction and apportionment with respect to every investment company (as defined by the Act of 1936) to which section 21 of the Act of 1922 applied. The short effect of this new provision was that with respect to every such investment company the special commissioners were enjoined to give a direction and make the consequential apportionment under section 21 (1) of the Act of 1922 however much or however little of the income of the company had been distributed. That is the origin of the mandatory provision now contained in section 262 (1) of the Income Tax Act, 1952, on which the company in the present case relies.

Before passing to the Income Tax Act, 1952, and the Finance Act of the same year, it will, we think, be convenient to refer to some of the provisions in regard to profits tax contained in the Finance Acts of 1937 and 1947.

Profits tax was imposed under the name of national defence contribution by section 19 of the Finance Act, 1937, and it was originally charged on the profits arising in each chargeable accounting period (as therein defined) from any trade or business carried on in the United Kingdom (with immaterial exceptions) at the rate of 5 per cent. in the case of a corporation and 4 per cent. in other cases.

Section 24 of the Act of 1937 has some bearing upon the question whether the profits tax in respect of which the special commissioners in the present case claim that the disputed deduction from the company's actual income from all sources falls to be made under section 68 (1) of the Finance Act, 1952, is "payable" within the meaning of that subsection. It provides as follows: "(1) The national defence contribution shall be "assessed and collected by the Commissioners of Inland Revenue "in accordance with the provisions of Part I of the Fifth "Schedule to this Act, and shall be due and payable at the "expiration of one month from the date of the assessment, and "shall be recoverable as a debt due to His Majesty from the "person on whom it is assessed. (2) Any person who is dis"satisfied with any such assessment may appeal subject to and "in accordance with the provisions of Part II of the said Schedule. "(3) The provisions of Part III of the said Schedule shall have "effect for the purpose of carrying into effect the provisions of "this section and of Parts I and II of the said Schedule and "otherwise for supplementing those provisions."

We also note, as bearing upon the same question, paragraph 1 of Part I of the Fifth Schedule to the Act of 1937, which provides as follows: "The national defence contribution payable in respect "of any chargeable accounting period shall be assessed on the "person carrying on the trade or business in that period"; and paragraph 5 of Part II of the same Schedule, which provides as follows: "Notwithstanding that an appeal is pending against an "assessment to the national defence contribution, such part of "the contribution assessed as appears to the Commissioners of "Inland Revenue not to be in dispute shall be collected and "paid in all respects as if it were a contribution charged by an "assessment in respect of which no appeal was pending, and on "the determination of the appeal any balance chargeable in "accordance with the determination shall be paid, or any amount "overpaid shall be repaid, as the case may require."

Section 25 of the Act of 1937 made profits tax a deductible expense for income tax purposes.

Radical alterations in relation to profits tax were introduced by the Finance Act, 1947. It is fortunately unnecessary to refer in detail to the highly complicated provisions of this Act. By section 30 the rate of tax was increased to 25 per cent. reducible by relief for non-distribution, and on the other hand increasable by distribution charges, in the events and manner therein provided. By section 31 (1) individuals were exempted from the tax, and by subsection (2) of the same section it was provided as follows: "The said section nineteen shall not apply to any "trade or business carried on by a body corporate during any "chargeable accounting period if, for a year or period which "includes, or for years or periods which together include, the "whole of the chargeable accounting period, the actual income "of the body corporate from all sources is apportioned under or "for the purposes of section twenty-one of the Finance Act, "1922, and all the persons to whom it is apportioned are "individuals."

Subsection (3) of section 31 is important as conferring the right of election on which the company in the present case relies. It is in these terms: "If, for a year or period which includes, or "for years or periods which together include, the whole of a "chargeable accounting period of a trade or business carried on "by a body corporate, the actual income of the body corporate "from all sources is apportioned under or for the purposes of "the said section twenty-one, and some (but not all) of the "persons to whom the income is apportioned are individuals, "then if by notice in writing given to the Commissioners within "six months from the end of that chargeable accounting period, "or such longer time as the Commissioners may in any case "allow, the body corporate and the persons other than individuals "to whom the income is apportioned jointly so elect as respects "that chargeable accounting period and each subsequent chargeable accounting period the whole of which is included in a year "or period or years or periods for which the said actual income "is so apportioned to those persons and persons who are individuals, the provisions of this Part of this Act shall apply as if—

" (*a*) the trade or business had been carried on, during that and " each such subsequent chargeable accounting period, in partner- " ship by the persons to whom the income is apportioned, and " the share of any one of them of the profits and losses of the " trade or business therefor had been equal to the proportion of " the income apportioned for the year or period or years or periods " in question which is apportioned therefor to that one of them; " and (*b*) any payment which is received from the body corporate " during that or any such subsequent chargeable accounting " period by any of the persons to whom the income is appor- " tioned, and which is not allowable as a deduction in computing " the profits of the trade or business therefor, had not been made; " and the body itself shall not be chargeable to profits tax for " that or any such subsequent chargeable accounting period."

Finally, so far as the Act of 1947 is concerned, section 35 (1) (*c*) has, as we understand it, the effect of making distributions in the winding-up of a company other than distributions of capital rank as distributions for the purposes of the tax.

We now come to the Income Tax Act, 1952. That Act replaced section 21 (1) of the Finance Act, 1922, by section 245, which as one of the sections directly relevant in this case we had better read verbatim: " With a view to preventing the " avoidance of the payment of surtax through the withholding " from distribution of income of a company which would other- " wise be distributed, it is hereby enacted that where it appears " to the special commissioners that any company to which this " section applies has not, within a reasonable time after the end " of any year or other period for which accounts have been made " up, distributed to its members, in such manner as to render " the amount distributed liable to be included in the statements " to be made by the members of the company of their total " income for the purposes of surtax, a reasonable part of its " actual income from all sources for the said year or other period, " the Commissioners may, by notice in writing to the company, " direct that, for purposes of assessment to surtax, the said " income of the company shall, for the year or other period " specified in the notice, be deemed to be the income of the " members, and the amount thereof shall be apportioned among " the members."

It also by section 248 (1) and (2) (again substantially replacing earlier legislation) provided as follows: " (1) Where a direction " has been given under section two hundred and forty-five of this " Act with respect to a company, the apportionment of the actual

C. A.
1957

Regina
v.
Income Tax
Special Commissioners.
Ex parte
Linsleys
(Established
1894) Ltd.

"income from all sources of the company shall be made by the "special commissioners in accordance with the respective "interests of the members. (2) Notice of any such apportion-"ment shall be given by serving on the company a statement "showing the amount of the actual income from all sources "adopted by the special commissioners for the purposes of the "said section two hundred and forty-five and either the amount "apportioned to each member or the amount apportioned to "each class of shares, as the Commissioners think fit."

It also replaced section 14 (1) of the Finance Act, 1939, by section 262 (1), which again is one of the immediately relevant provisions and is in these terms: "Subject to the provisions of "this section with respect to companies with estate or trading "income, the whole of the actual income from all sources, for "every year of assessment, of every investment company to "which section two hundred and forty-five of this Act applies "shall, however much or however little thereof has been distri-"buted to its members, be deemed for the purposes of assessment "to surtax to be the income of the members of the company, "and accordingly the special commissioners shall give a direc-"tion under the said section two hundred and forty-five in respect "of each year of assessment in relation to every such company "without considering whether or not the company has distributed "a reasonable part of its said income."

We think the only other provisions of the Income Tax Act, 1952, to which we need refer at length are paragraph (*a*) of the proviso to section 262 (2), which is in these terms: "Provided "that—(*a*) no deduction shall be allowed in computing the actual "income from all sources of the company which would not be "allowable in computing the total income of an individual for "the purposes of this Act, other than deductions for any profits "tax payable by the company or for any such sums disbursed "by the company as expenses of management as the special "commissioners consider reasonable, having regard to the "requirements of the company's business and, in the case of "directors' fees or other payments for services, to the actual "services rendered to the company"; and section 255 (3) which reproduces in substantially identical terms paragraph 6 of the First Schedule to the Finance Act, 1922, and is in these terms: "In computing, for the purposes of this Chapter, the actual "income from all sources of a company for any year or period, "the income from any source shall be estimated in accordance "with the provisions of this Act relating to the computation of "income from that source, except that the income shall be "computed by reference to the income for such year or period "as aforesaid and not by reference to any other year or period." We should, however, mention that section 256 (1) provides, so far as material, that section 245 shall (as did section 21 of the Finance Act, 1922) apply to any company which is under the control of not more than five persons; that section 257 (2) preserves (mutatis mutandis) the old definition of an "investment company"; and finally that section 25 of the Finance Act, 1937, which, as we have said, made profits tax a deductible expense for income tax purposes, was repealed by the Income Tax Act, 1952, but re-enacted in substantially identical terms by section 141 of that Act.

The Finance Act, 1952, repealed section 141 of the Income Tax Act, 1952, and by section 33 (1) provided as follows: "The "profits tax payable for any chargeable accounting period ending "after the end of the year nineteen hundred and fifty-one shall "not be allowed as a deduction in computing the profits or gains "or losses of a trade or business for the purposes of income tax "for the year 1951–52 or any subsequent year of assessment, "and sums disbursed in discharge of profits tax for any such "period shall not be treated as sums disbursed as expenses of "management for the purposes of any income tax relief for any "such year of assessment in respect of expenses of management."

We come at length to section 68 of the Finance Act, 1952, subsections (1) and (2) of which are in these terms: "(1) Where "for the purposes of section twenty-one of the Finance Act, "1922, or Chapter III of Part IX of the Income Tax Act, 1952 "(which provide for the payment of surtax, in certain cases, on "undistributed income of companies), the actual income from "all sources of a body corporate for a year or period ending after "the end of the year nineteen hundred and fifty-one falls to be "computed under paragraph 6 of the First Schedule to the said "Act of 1922 or subsection (3) of section two hundred and fifty-"five of the said Act of 1952, then, if any amount is payable by "the body corporate by way of the profits tax or the excess "profits levy, respectively, for any chargeable accounting period "falling wholly or partly within that year or period, a deduction "shall be allowed, in computing the said actual income, of such "an amount as would, after deduction of income tax at the "standard rate in force for the year of assessment during which "the said year or period ends, be equal to so much of the amount "so payable by the body corporate as is apportionable to the said

C. A.
1957

REGINA
v.
INCOME TAX
SPECIAL COMMISSIONERS.
Ex parte
LINSLEYS
(ESTABLISHED
1894) LTD.

"year or period: Provided that this subsection does not apply "in relation to any chargeable accounting period ending at or "before the end of the year nineteen hundred and fifty-one. "(2) Paragraph (*a*) of the proviso to subsection (2) of section "two hundred and sixty-two of the Income Tax Act, 1952 (which "relates to the deductions allowable in computing the actual "income from all sources of an investment company in relation "to which a direction is in force under subsection (1) of that "section), shall have effect as if instead of authorising a deduction for profits tax payable by the company it authorised a "deduction, in relation to any amount payable by the company "by way of profits tax or the excess profits levy, of such an "amount as would, after deduction of income tax at the standard "rate in force for the year of assessment in respect of which the "direction is given, be equal to the first-mentioned amount."

As to the facts, the company was admittedly an investment company within the meaning of section 257 of the Income Tax Act, 1952, during the year of assessment, April 6, 1952, to April 5, 1953. We are, as we have said earlier in this judgment, for the time being assuming that the company was also an investment company within the meaning of that section from April 6, 1953, down to the commencement of its voluntary liquidation on May 7, 1953.

The relevant chargeable accounting period of the company for the purposes of profits tax is the period from April 1, 1953, to May 7, 1953, and the company has been assessed to profits tax for that period in the sum of £18,987. The company has agreed that figure in point of amount but not in point of liability, which is the subject of a pending appeal by the company.

In order to ascertain the amount which ought, if and when deductible, to be deducted in respect of profits tax under section 68 (1) of the Finance Act, 1952, in computing the company's actual income from all sources for the purposes of sections 245 and 262 of the Income Tax Act, 1952, it is necessary to calculate the proportion of the profits tax assessment of £18,987 for the period April 1, 1953, to May 7, 1953, attributable to the part of the year of assessment 1953/1954 which had elapsed at the date of the company's liquidation, that is to say, the period from April 6, 1953, to May 7, 1953. That proportion is £16,421 3s. 9d., which when "grossed up" as required by section 68 (1) of the Finance Act, 1952, comes to £29,856 14s. 1d.

The amount of the company's actual income from all sources for the period from April 6, 1953, to May 7, 1953, computed without any deduction in respect of profits tax does not exceed £8,920.

It is thus apparent that if the special commissioners are right in their submission that the deduction in respect of profits tax required by section 68 (1) of the Finance Act, 1952, must be made before giving any direction in respect of the company under sections 245 and 262 (1) of the Income Tax Act, 1952, it necessarily follows that any such direction subsequently given would be in respect of a nil amount of income, for the deduction of £29,856 14s. 1d. from £8,920 produces a minus quantity.

Returning to the arguments summarized earlier in this judgment, we will for convenience of discussion term a company to which section 245 of the Income Tax Act, 1952, applies, but which is not an investment company, " a 245 company "; and a company to which that section applies and which is an investment company " a 262 company."

It seems to us that the first matter for determination is the time at which the actual income from all sources of a 245 company or a 262 company does, within the meaning of section 68 (1) of the Finance Act, 1952, " fall to be computed " under paragraph 6 of the First Schedule to the Finance Act, 1922, or section 255 (3) of the Income Tax Act, 1952, for it is only when the income of the company concerned does fall to be so computed that the deduction in respect of profits tax is to be made. The Attorney-General submits that the income of the company concerned falls to be so computed before any direction is given. He does not fix any exact moment of time, but he says it must be before any direction is given, on the ground that the special commissioners must compute the income of a 245 company before they can form the opinion that it has not distributed a reasonable part of its income from all sources, and must likewise compute the income of a company before they can conclude that it is a 262 company and as such amenable to automatic direction. We think this is wrong.

No doubt the special commissioners must necessarily make calculations, or obtain from the company concerned calculations, of the actual income from all sources of the company concerned, before they can decide whether to give a direction or not in the case of a 245 company, or whether a company is a 262 company in respect of which they must automatically give a direction. But such calculations are provisional and preliminary only, and cannot of themselves have any effect on the liability (if any) of the company concerned to surtax. We think "falls to be computed" means "is required by law" or "is required by the "relevant statutory provisions to be computed"; and that meaning of the phrase can only be satisfied by the giving of a direction. Take the case of a 245 company. The special commissioners here have a discretion whether to give a direction or not. They may be thinking of giving a direction or may even have decided to give a direction; but unless and until a direction is actually given the company's income does not "fall to be computed" in any way other than the ordinary method applicable in cases to which section 245 does not apply. We would test this by reference to the very deduction which is in question here. It will be remembered that section 141 of the Income Tax Act, 1952, which allowed profits tax as a deduction for income tax purposes, was repealed by the Finance Act, 1952, which by section 33 (1), cited at length above, prohibits any such deduction. There could, therefore, as it seems to us, be no question of a 245 company in respect of which no direction had been given making or being allowed any deduction on that account. If "falls to be computed" has the meaning we suggest, all is clear. The case is taken out of the ordinary rule, and a special deduction is allowed. If, on the other hand, "falls to be computed" means, as the Attorney-General would have it, "is computed by the special commissioners with a view "to deciding whether to give a direction or not," it seems to us that a mere computation by the special commissioners with a view to deciding whether to give a direction or not would, although not in fact followed by any direction, entitle the 245 company concerned to be assessed in the special way, and claim the special deduction, allowed by section 68 (1).

If we are right as to the effect of section 68 (1) of the Finance Act, 1952, in relation to a 245 company, we think the same result follows in relation to a 262 company. Section 68 (1) of the Finance Act, 1952, draws no distinction between them, and the machinery of direction and apportionment is common to both cases. Moreover, although in the case of a 262 company the whole of its actual income from all sources is, by section 262 (1) itself, deemed to be income of its members irrespective of the amount of any distributions, and the special commissioners are accordingly required to give a direction under section 245 in any such case, the giving of such a direction is nevertheless a necessary step for the purpose of bringing into operation in any particular case the general principle which section 262 (1) lays down, and the consequences as to computation of income referred to in section 68 (1) of the Finance Act, 1952. But the matter does not rest there, for it is, as we think, abundantly plain that section 68 (2) treats the deduction in the case of a 262 company as authorized only when a direction is in force. It seems to us also that section 248 (2) of the Income Tax Act, 1952, points in the same direction, as the language of that subsection would appear to indicate the taking by the special commissioners of the following steps in the following order: (a) direction; (b) computation of actual income from all sources; and (c) notice of apportionment in the form of a statement showing the amount of the actual income from all sources adopted by the special commissioners and the amount apportioned to each member or to each class of shares. We should add that to our minds the very "grossing up" of the amount of the deduction allowed in respect of profits tax strongly suggests that the deduction is intended for cases in which the income of the company concerned has been made—or in the case of a 262 company perhaps we should say effectively made—income of its members for surtax purposes, that is to say, cases in which a direction has been given.

It follows that in our opinion there was actual income of the company from all sources for the period April 6, 1953, to May 7, 1953, amounting to or provisionally estimated at £8,920, in respect of which the special commissioners can give a direction under section 262 (1) of the Income Tax Act, 1952, and if they can give such a direction then in view of the mandatory terms of the subsection they are clearly bound to give it.

On this footing it seems to us impossible, once the special commissioners have given the direction which in our view they are bound to give, to hold that the profits tax in respect of which they have sought to make the deduction mentioned in section 68 (1) of the Finance Act, 1952, is "payable" within the meaning of that subsection. Once the direction is given (and for the present purpose it should be treated as having been given) the way is clear for an exercise of the right of election conferred by section 31 (3) of the Finance Act, 1947. We understand it is not in dispute that apportionment follows as a necessary consequence of the direction. Accordingly, all the conditions precedent to an exercise of the right of election will have been fulfilled. The actual income of the company from all sources for the period April 6 to May 7, 1953, will have been apportioned. There has also admittedly been an apportionment of such income for the period from April 1 to April 5, 1953. These two periods together include the whole of the chargeable accounting period from April 1, 1953 to May 7, 1953. Admittedly some, but not all of the persons to whom the income has been or is to be apportioned are individuals. There remains only the question of time. The right is expressed to be exercisable by notice in writing to the commissioners (that is to say, according to section 74 (5) of the Finance Act, 1947, the Commissioners of Inland Revenue) within six months from the end of the relevant chargeable accounting period, or such longer time as the Commissioners may in any case allow. We assume that in the circumstances of this case, in which the refusal, and as we hold the wrongful refusal, of the special commissioners to give a direction has made it impossible to exercise the right of election at any earlier date, a reasonable time within which it may now be exercised will be allowed.

Accordingly, the amount of profits tax in question is not, in our opinion, an amount certainly and presently payable, but an amount which will become payable only in the contingency of the right of election not being exercised, and which will never become payable in the event of the right of election being exercised. Such an amount, in our view, clearly cannot be an amount which is "payable" within the meaning of section 68 (1) of the Finance Act, 1952, or within any reasonable meaning of the word. It is a sum which may or may not be payable according to the course of events.

Therefore, it cannot, in our view, be said that a direction would merely have the effect of reducing the company's actual income from all sources to nil on the ground that, the profits tax being "payable" within the meaning of section 68 (1) of the Finance Act, 1952, the amount calculated in accordance with section 68 (1) thereof would thereupon become forthwith deductible under that subsection. The actual income of the company from all sources for the relevant period would stand at £8,920 or whatever the exact figure may be, though no doubt reducible to nil in the event of the profits tax becoming payable. We see no insuperable difficulty in framing the consequential apportionment or apportionments (for the Attorney-General, as we understood him, agreed that supplementary apportionments could, if necessary, be made) in such a way as to meet this state of affairs.

This reasoning suffices, in our judgment, to dispose of the appeal, subject to the Attorney-General's submission to the effect that the company was not at the material time an investment company within the meaning of section 262 of the Finance Act, 1952. Before passing to that, however, we should perhaps say a word about the more general aspect of the argument on the issue as to whether the profits tax is "payable" within the meaning of section 68 (1) of the Finance Act, 1952, on the assumption that the question whether it is payable, and consequently gives rise to the deduction prescribed by section 68 (1) of the Finance Act, 1952, falls to be determined before any direction is given. On this assumption, the circumstances in which that question must be answered are these: (1) It is not in dispute that the profits tax if payable at all is, in point of amount, correctly assessed at £16,421 3s. 9d.; (2) the profits tax will, however, not be payable at all in the event of the right of election under section 31 (3) of the Finance Act, 1947, being exercised; and (3) the assessment or assessments to profits tax is or are the subject of a pending appeal by the company on the ground indicated in (2) above, which we understand to be the sole ground of appeal; but (4) the right of election upon which the appeal is based can, having regard to the terms of section 31 (3) of the 1947 Act, only arise if and when a direction is given and the consequential apportionment is made, an event which has not happened and, if the special commissioners have their way, will never happen.

In these circumstances, it is contended for the special commissioners that the profits tax is "payable" within the meaning of section 68 (1) of the Finance Act, 1952.

In support of this argument, reliance is placed on section 24 (1) of the Finance Act, 1937, which provides that the tax "shall be due and payable at the expiration of one month from "the date of the assessment, and shall be recoverable as a debt "due to His Majesty from the person or persons on which it is "assessed." Reliance is also placed on paragraph 1 of Part I of the Fifth Schedule to the same Act, which provides that the tax "payable" in respect of a given period shall be assessed on the persons carrying on the trade or business in that period. It is pointed out, further, that section 68 (4) of the Finance Act, 1952, refers to the amount "payable" by a body corporate for a given period in respect of the excess profits levy and goes on to provide that the amount so described may be reduced in the event of a deficiency of profits for a subsequent period.

We do not think that the use of the word "payable" in these statutory provisions really assists the special commissioners' case. The word "payable" has more than one meaning, and must be construed in any given case by reference to the exact context in which it appears.

More to the point, as we think, is paragraph 5 of Part II of the Fifth Schedule to the 1937 Act, on which Mr. King relied on the company's behalf. That paragraph provides that where an appeal is pending against an assessment to profits tax such part of the tax as appears to the Commissioners of Inland Revenue not to be in dispute shall be collected and paid in all respects as though no appeal was pending. This seems to us to mean, as a matter of necessary implication, that any amount which is in dispute is not to be collected or paid, or in other words is not to be payable pending the appeal; and where the appeal challenges in toto the alleged liability to tax it is obvious that the dispute extends to the whole amount.

The Attorney-General also relied on this well-known passage from the speech of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners*[1]: "My Lords, I shall now permit "myself a general observation. Once that it is fixed that there "is liability, it is antecedently highly improbable that the statute "should not go on to make that liability effective. A statute is "designed to be workable, and the interpretation thereof by a "court should be to secure that object, unless crucial omission "or clear direction makes that end unattainable. Now, there are "three stages in the imposition of a tax: there is the declaration "of liability, that is the part of the statute which determines "what persons in respect of what property are liable. Next, there "is the assessment. Liability does not depend on assessment. "That, ex hypothesi, has already been fixed. But assessment "particularizes the exact sum which a person liable has to pay. "Lastly, come the methods of recovery, if the person taxed does "not voluntarily pay." But these observations related to a wholly different case concerning the liability of a non-resident to supertax (as it was then) on profits arising in this country. Here the question is not whether the liability to tax depends on the charge imposed by the taxing legislation or on the assessment made pursuant to such legislation, but whether the taxing legislation itself has imposed a certain, as distinct from a merely contingent, liability to tax.

In *W. H. Cockerline & Co.* v. *Inland Revenue Commissioners*,[2] to which the Attorney-General also referred, Lord Hanworth

---

[1] [1926] A.C. 37, 52; 42 T.L.R. 58; 10 T.C. 88, 110.

[2] (1930) 47 T.L.R. 13, 14, 15; 16 T.C. 1, 18, 19.

M.R. cited the above passage from the speech of Lord Dunedin, together with a passage in a similar sense from the judgment of Sargant L.J. in an unreported case of *Williams* v. *Henry Williams*,[3] and applied the law as therein laid down to repel an argument presented on behalf of a taxpayer who was seeking to re-open a final settlement of his tax liability to the effect that a certain payment made by him on account of tax was invalid because there had been no assessment. This, again, appears to us to be very far removed from the present case.

Finally, on this part of the case, the Attorney-General referred to *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.*,[4] in which it was held that under section 18 (1) of the Finance Act (No. 2), 1939, the excess profits tax "payable" in respect of a trade or business for any chargeable accounting period, and consequently deductible for income tax purposes as an expense incurred in that period, was the excess profits tax as assessed and not the reduced amount which might ultimately become payable in consequence of subsequent deficiencies. But that case only shows that a tax may be said to be payable in respect of a given period when it has been quantified by assessment, although the legislation provides that the amount as originally assessed may be reduced on account of losses sustained in subsequent periods.

We do not think it follows from this that where the legislation charging a particular tax gives taxpayers a right of election which if exercised will exempt them from liability for such tax, references in the legislation to the tax as "payable" are to be understood as meaning that the tax must be treated as payable notwithstanding the existence of the right of election. Nor, in our view, can it be right in such a case to hold that where under the relevant legislation the special commissioners are bound to take a certain step if the tax is not payable, and that step is a necessary preliminary to any exercise of the right of election, which if exercised will prevent the tax from being payable, the special commissioners are entitled to refrain from taking that step and claim that because they have not taken it, and have thus precluded any exercise of the right of election, therefore the tax is beyond a peradventure payable inasmuch as the right of election can never be exercised.

We need say no more than that we agree with the conclusion of the Divisional Court on this aspect of the case, though as

[3] Unreported.

[4] [1950] A.C. 149; [1950] 1 All E.R. 1; 31 T.C. 274.

appears from what we have said above it is in our view unnecessary for the purposes of the present appeal to form any decided opinion upon the question whether these more general grounds in themselves suffice to make good the company's contention that the profits tax with which we are here concerned is not "payable" within the meaning of section 68 (1) of the Finance Act, 1952, even if (contrary to our view) that point falls to be determined before a direction is given.

It follows that we need express no view one way or the other on the question whether the procedure of direction and apportionment can be applied to a company whose income is nil as distinct from a company that has income which is contingently liable to be reduced to nil in a particular event.

It remains finally to consider the Attorney-General's submission to the effect that the company was not, during the relevant period, an investment company within the meaning of section 262 (1) of the Income Tax Act, 1952.

The Attorney-General invites us so to hold by the following process of reasoning: the income of the company for the relevant period, that is to say, the period from April 6, 1953, to May 7, 1953, was (subject to profits tax) £8,920 or thereabouts, the whole of which was admittedly investment income. From this, however, the profits tax for the like period, that is to say, £16,421 3s. 9d. must be deducted. Consequently the income of the company for the relevant period was nil. But a company which has no income cannot be an investment company; for, having no income at all, it obviously cannot be said to have investment income. He relies on *F. P. H. Finance Trust Ltd. (in Liquidation)* v. *Inland Revenue Commissioners*,[5] where it was held that a company which had income derived from investments and also carried on a trade was not an investment company with respect to a period in which it made losses on trading far exceeding its income from investments and so during the relevant period had no income at all. It seems to us that if we are right in thinking that the other submissions made by the Attorney-General fail, this final submission necessarily fails with them, for if the profits tax is not payable within the meaning of section 68 (1) of the Finance Act, 1952, so that the deduction prescribed by that subsection does not fall to be made, then the company did during the relevant period have income estimated at £8,920 and admittedly consisting wholly of investment income. It is no doubt true that in the event of the right of election not being exercised that income will by reason of the profits tax deduction ultimately be reduced to nil, but that possibility does not, as it seems to us, afford any answer to the company's contention that the company, as matters now stand, is an investment company in respect of which a direction can and ought to be given. On the other hand, if, contrary to our view, the other submissions made by the Attorney-General should prevail, the question whether the absorption of the whole of the company's actual income for the relevant period by the profits tax deduction would have the effect of excluding it from the category of investment companies so far as that period was concerned becomes purely academic. We therefore need not pause to consider whether that deduction would be truly comparable for this purpose to the trading loss which absorbed the whole of the investment income of the company concerned in the *F. P. H. Finance Trust Ltd.'s* case.[6]

---

[5] [1944] A.C. 285; 60 T.L.R. 450; [1944] 1 All E.R. 653; 26 T.C. 131.

For the reasons we have endeavoured to state, we would dismiss this appeal.

Appeal dismissed with costs.
Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Smith & Hudson for Rollit, Farrell & Bladon, Hull.*

---

[6] [1944] A.C. 285.

REGINA *v.* PERFECT.

C. C. A.
1957
Apr. 8, 15.

Lord Goddard C.J., Hilbery and Streatfeild JJ.

Criminal Law — Sentence — Supervision order—Previous convictions—Offence committed while on probation for previous offence—Concurrent sentences of 12 *months' imprisonment imposed by same court on same day—Order to report on discharge made after conviction for subsequent offence—Whether convicted on two previous occasions — Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 22 (1), *as amended by Prison Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 52), *s.* 29 (1).

Criminal Law—Court of Criminal Appeal—Sentence, appeal against—Practice—Appeals against sentence in cases sent to quarter sessions —Committal order to be sent to Court of Criminal Appeal for rectification if sentence altered.

The appellant was convicted of housebreaking in August, 1952, and placed on probation for two years. During the currency of the probation he was convicted of a further offence for which quarter sessions in August, 1954, sentenced him to 12 months' imprisonment, at the same time imposing a concurrent sentence of 12 months' imprisonment for the offence for which he had been placed on probation. The appellant was subsequently convicted of unlawful wounding and quarter sessions, to whom he was committed for sentence under section 29 of the Criminal Justice Act, 1948, sentenced him to 18 months' imprisonment and made an order under section 22 [1] of the Act on the basis of the two previous convictions. On appeal against that order:—

Held, that section 22 (1) (*a*) required sentences of imprisonment, as well as convictions, on two previous occasions, which meant sentences imposed on separate appearances before a court, and in the present case both sentences were imposed on the same occasion. Moreover, the appellant had not been convicted on two previous occasions, as the conviction for which he was placed on probation did not rank as a conviction until sentence was passed. Accordingly, the order made under section 22 (1) must be quashed.

Reg. v. *Rogers* [1953] 1 Q.B. 311; [1953] 1 All E.R. 206; 36 Cr.App.R. 203 applied.

Per curiam. In an appeal against sentence in a case sent to quarter sessions under section 29 of the Criminal Justice Act, 1948, it would be convenient for the committal order with the sentence endorsed thereon to be sent to the Court of Criminal Appeal for rectification if the sentence is altered just as is done with an indictment.

Appeal against sentence.

In 1957 the appellant, John William Perfect, was convicted by a magistrates' court of unlawful wounding and committed for sentence to the East Kent quarter sessions. Notice was served on him under section 23 (1) of the Criminal Justice Act, 1948, and he admitted that on August 25, 1952, he had been placed on probation for two years at the East Kent quarter sessions for housebreaking; that on August 23, 1954, having committed a further offence while on probation, he was sentenced at the same sessions to 12 months' imprisonment in respect of the offence for which he had been put on probation and was also sentenced by the same court to 12 months' imprisonment for the subsequent offence of shopbreaking. Both sentences were made to run concurrently. In respect of his conviction for unlawful wounding, the appellant was sentenced to 18 months' imprisonment and quarter sessions also made an order under section 22 (1) of the Act of 1948.[1] The appellant appealed against sentence and leave to appeal was given only on the question whether the latter order should have been made.

---

[1] Criminal Justice Act, 1948, s. 22 (1) (as amended by s. 29 of the Prison Act, 1952): "Where a person "is convicted on indictment of an "offence punishable with imprisonment for a term of two years or "more and that person—(*a*) has "been convicted on at least two

Geoffrey Davey for the appellant. Quarter sessions founded the order under section 22 (1) of the Criminal Justice Act, 1948, on the basis of the two previous convictions for which sentences of imprisonment had been passed. As both sentences were passed by quarter sessions on the same day, they were not two separate sentences: *Reg.* v. *Rogers.*[2] Therefore the order should not have been made. Furthermore, if it be necessary so to argue, the position is the same in relation to the two convictions. A conviction which results in a probation order does not rank as a conviction until sentence is passed: section 12 (1) of the Act. The effect in the present case is that the appellant was not convicted for the original offence until August 25, 1954, on which date he was also convicted of the further offence. Therefore *Reg.* v. *Rogers* [2] applies.

Dorothy Knight Dix for the Crown. A distinction must be drawn between "conviction" and "sentence." For the purposes of section 22 (1) the question is whether a person has been convicted on two previous occasions. The point in the present case is whether the appellant was convicted for the first offence on the day when the court made the probation order or on the day when he was sentenced in consequence of his breach of it. It is submitted that the conviction dates from the day when the probation order was made: see section 3 (1) of the Act, which empowers a court before whom a person "has been convicted" of an offence, instead of sentencing him, to make a probation order. Clearly this appellant was first convicted on August 25, 1952. All that quarter sessions did in 1954 was to sentence him, as they were entitled to do under section 6 (4) of the Act. Section 12 (1) does not avail the appellant. Its effect, so far as an adult offender is concerned, is that an offence for which he is put on probation ranks as a conviction for the purposes of corrective training or an order under section 22 (1) if he breaks his probation. Had the appellant been under 17 years of age at the time of the original offence, the case for the Crown would have

---

"previous occasions of offences "for which he was sentenced to "Borstal training or imprisonment; ". . . the court, if it sentences him "to a term of imprisonment of twelve "months or more, shall, unless . . . "it otherwise determines, order that "he shall for a period of twelve "months from his next discharge "from prison be subject to the provisions of section 29 of the Prison "Act, 1952."

[2] [1953] 1 Q.B. 311; [1953] 1 All E.R. 206; 36 Cr.App.R. 203.

been unarguable in view of the proviso to section 12 (1). *Reg.* v. *Rogers* * is not directly in point, because there there was no interval of time between conviction and sentence. Here there were two separate convictions, the requirements of section 22 (1) were satisfied and the order was validly made.

Geoffrey Davey in reply referred to section 8 (5) of the Act.

Cur. adv. vult.

LORD GODDARD C.J. stated the facts and continued: The question is whether on February 2, 1957, when the appellant was sentenced for the present offence, he was a person who had been convicted on at least two previous occasions of offences for which he was sentenced to imprisonment. There were thus two separate convictions, the first in August, 1952, and the second in August, 1954, but the sentences were passed on the same day. Section 8 (5) of the Criminal Justice Act, 1948, provides that where it is proved to the satisfaction of the court by which a probation order was made that the probationer has been convicted and dealt with in respect of an offence committed during the probation period the court may deal with him, for the offence for which the order was made, as if he had just been convicted by or before the court for that offence. So quarter sessions had jurisdiction to deal with him in August, 1954, both for the offence committed in 1952 for which he was placed on probation and the subsequent offence in 1954. By section 12 (1) of the Act a conviction on which an offender is placed on probation is not deemed to be a conviction for any purpose other than the purpose of the proceedings in which the order is made and of any subsequent proceedings which may be taken against him under the foregoing provisions of the Act, provided, however, that where an offender who is not less than 17 years of age at the time when he was placed on probation is subsequently sentenced for that offence this subsection does not apply. The effect of this section has been explained both in *Rex* v. *Harris* [1] and *Rex* v. *Stobbart*,[2] and in the latter case it was emphasized how desirable it was to pass some sentence, even if a nominal one, where a probationer had broken the terms of his probation, so that the offence for which he had been dealt with in that manner would thereafter count as a conviction. Section 22, however, would seem to require not only convictions on two previous occasions but sentences of imprisonment on two previous occasions, for if on one of the previous convictions only a fine had been imposed the section would not apply. This court had to consider the words "previous occasions" in *Reg.* v. *Rogers*,[3] a case relating to preventive detention. The court there pointed out that the same construction must be given to these words in section 22 as in section 21 (1) and (2), which deal with the requirements for sentences of corrective training or preventive detention. It was held that separate occasions meant appearances at a separate court of quarter sessions or assize. The conviction for which a probation order was made did not rank as a conviction till the appellant was sentenced at the sessions in August, 1954, when he was also convicted of a subsequent offence. We think, therefore, that the reasoning in *Rogers'* case [3] applies to the present case and, accordingly, we quash the order under section 22.

---

* [1953] 1 Q.B. 311.

[1] [1951] 1 K.B. 107; 66 T.L.R. (Pt. 2) 739; [1950] 2 All E.R. 816.

[2] [1951] 2 T.L.R. 823; [1951] 2 All E.R. 753.

We desire to add for the guidance of clerks of the peace that it would be convenient when there is an appeal against sentence in a case sent to the sessions under section 29 for the committal order with the sentence endorsed thereon to be sent to this court for rectification if the sentence is altered, just as is done with an indictment.

Order quashed.

Solicitors: *Registrar, Court of Criminal Appeal; Prosecuting Solicitor, County Hall, Maidstone.*

E. M. W.

---

[3] [1953] 1 Q.B. 311; [1953] 1 All E.R. 206; 36 Cr.App.R. 203.

[GLAMORGAN ASSIZES.]

REGINA *v.* BEYNON.

1957
Apr. 3.

Byrne J.

Criminal Law — Plea — Fitness to plead — Whether the defence can require the general issue to be tried before the issue of fitness to plead.

On the arraignment of a prisoner indicted for murder counsel for the Crown, before plea, submitted that the issue of fitness to

---

[Reported by HYWEL AP ROBERT, Esq., Barrister-at-Law.]

plead should be tried first. Defending counsel desired the general issue to be tried first:—

Held, that, as an insane person cannot be tried, a jury must be sworn to try the fitness of the prisoner to plead as a preliminary issue.

Reg. v. *Roberts* [1954] 2 Q.B. 329; [1953] 2 All E.R. 340 not followed.

Trial on indictment.

At Cardiff Assizes the accused, Henry Beynon, was charged on an indictment (signed before the Homicide Act, 1957, came into force) with murder. On his arraignment and before he pleaded, counsel for the Crown applied that the fitness of the accused to plead should be tried as a preliminary issue. Counsel for the defence submitted that it was not open to the Crown so to apply, and applied that the issue of fitness to plead should be postponed until after the trial of the general issue.

F. Elwyn Jones Q.C. and *Alun Davies* for the Crown. There is a preliminary issue, whether the accused is fit to plead, and it is proposed to call evidence directed to that issue.

Norman Richards Q.C. and *Bruce Isaac* for the accused. It is not open to the Crown to raise the issue of fitness to plead at this stage if the defence desires the general issue to be tried: *Reg.* v. *Roberts*.[1] The defence is entitled to ask that the issue of fitness to plead be postponed until after the trial of the general issue, so that the accused is not deprived of the possibility of being acquitted: Halsbury's Laws of England, 3rd ed., vol. 10, p. 402, para. 729. There is no material distinction between a deaf mute as in *Roberts'* case [1] and a person for any other reason incapable of following the proceedings, for the purposes of section 2 of the Criminal Lunatics Act, 1800. Section 2 is permissive and not mandatory; it lays down the procedure to be followed where, as in the majority of cases, the defence does not seek to raise the general issue. If a prisoner found unfit to plead at any time returns to sanity he is liable to be tried, after a lapse possibly of years, after which defence witnesses may no longer be available; the Crown has the depositions of its witnesses. Natural justice requires that an accused man should be tried on the facts, if his counsel so advises. *Reg.* v. *Roberts*,[1] in which the previous authorities are reviewed, is, though not binding on this court, clear authority for the course suggested. It is also to be observed, from the point of view of natural justice, that a verdict of unfitness to plead can be reviewed neither by the Court of Criminal Appeal nor by the Court for Crown Cases Reserved, since it imports no conviction for felony or misdemeanor.

---

[1] [1954] 2 Q.B. 329; [1953] 2 All E.R. 340.

Elwyn Jones Q.C. in reply. The issue of fitness to plead may be raised by the defence, by the Crown, or by the court of its own motion: *Rex* v. *Dashwood*,[2] *per* Humphreys J. Almost the whole weight of authority, quite apart from the Act of 1800, supports the proposition that a person who is unfit to plead cannot be tried while so unfit: Hale's Pleas of the Crown, vol. 1, p. 34, cited by Parke J. in *Rex* v. *Dyson*,[3] was approved of by Alderson B. in *Rex* v. *Pritchard*.[4] *Reg.* v. *Roberts*[5] is distinguishable in that there the accused was found mute by visitation of God. Devlin J.'s attention was not drawn to the Act of 1800. [*Reg.* v. *Berry*[6] was also referred to.]

Norman Richards Q.C. in rejoinder. None of the authorities cited apply to the case where the defence desires the general issue to be tried; they lay down what may lawfully be done, on the assumption that the defence has not applied to have the facts tried out. There is no distinction between *Reg.* v. *Roberts*[7] and the present case. *Roberts'* case[7] was argued throughout on the basis of the Act of 1800. To be a deaf mute and to suffer from a defect of the mind are equally to be "insane" for the purposes of the Act. *Roberts'* case[7] was rightly decided and the decision covers the present case.

Byrne J. Before the plea was taken in this case, Mr. Elwyn Jones, for the Crown, drew my attention to the fact that there was a preliminary issue to try, namely, whether the defendant was insane so that he could not be tried on this indictment. Mr. Norman Richards objected to the empanelling of a jury to try that issue because, he said, unless the law compels the court to deal with the issue of insanity, then natural justice requires that the general issue should be tried. He referred me, as authority for the proposition that the general issue could be tried before the issue of insanity, to *Reg.* v. *Roberts*.[1] That was a case which was tried in this court by Devlin J., where a man charged with murder was found to be mute by the visitation of God. The question then arose whether there should be a trial of the preliminary issue whether he was insane so that he could not be tried. Devlin J. came to the conclusion, on objection being raised by the defence to that course, that the general issue should be tried first of all. His attention, I feel, was not drawn to one or two matters to which my attention has been drawn by Mr. Elwyn Jones, but I would say, first of all, that, in the light of my experience both at the Bar and on the Bench, it sounds to me a novel proposition that the preliminary issue should not be tried.

---

[2] [1943] K.B. 1, 4; [1942] 2 All E.R. 586.

[3] (1831) 7 C. & P. 305n.

[4] (1836) 7 C. & P. 303.

[5] [1954] 2 Q.B. 329.

[6] (1876) 1 Q.B.D. 447.

[7] [1954] 2 Q.B. 329.

[1] [1954] 2 Q.B. 329; [1953] 2 All E.R. 340.

As I have always understood the law and seen it administered, if the court is aware of the fact that there is a preliminary issue whether the person who is charged before the court on an indictment is insane so that he is unfit to be tried, it is the duty of the court to see that that issue is tried, even though no application is made by the prosecution or by the defence. I find that that view is fortified by a judgment of Humphreys J. in *Rex* v. *Dashwood*,[2] in which he was giving the judgment of the Court of Criminal Appeal, composed of himself, Hilbery and Tucker JJ.

Humphreys J. said [3]: "It is a cardinal principle of our law "that no man can be tried for a crime unless he is in a mental "condition to defend himself. That matter was present to the "minds of the appellant's counsel when he pleaded 'Not Guilty.' "It was open to them at that time, if they had so desired—"indeed, it was their duty if they so thought—to invite the "judge to do what he would have been bound to do, namely, "direct that the issue of the appellant's ability to plead should "be tried by a jury. That would have been done, and it should "be known, if there is any person who is not aware of it, that the "court acts in such a case on information conveyed to it from "any quarter. It does not matter whether the information "comes to the court from the defendant himself or his advisers "or the prosecution or an independent person, such as, for "instance, the medical officer of the prison where the defendant "has been confined." That appears to me to be the plainest possible statement of the way in which this matter has always been dealt with by the courts.

In *Rex* v. *Rivett*,[4] on arraignment, the preliminary issue had been tried on the application of counsel for the prosecution, and the jury had found that the appellant was fit to plead. The trial could not take place at the Suffolk Assizes owing to lack of time, and was adjourned to the Norfolk Assizes, and, at the latter assizes, counsel for the defence applied for the preliminary issue to be retried, and the judge acceded to that request, when, again, the jury found that the appellant was fit to plead. What was said in the Court of Criminal Appeal is, in my view, important, although it is obiter. Lord Goddard C.J., in giving the judgment of the court, consisting of himself, Humphreys and Sellers JJ., said[5]: "It is now necessary to refer to what happened at the "trial, which, at any rate in one respect, was somewhat unusual. "Counsel for the prosecution informed the judge when the "prisoner was brought up at the Suffolk Assizes that he was "instructed that there was a question as to the prisoner's fitness "to plead; this was a perfectly correct course for the prosecution "to take, and a jury was accordingly sworn to try that issue."

---

[2] [1943] K.B. 1; [1942] 2 All E.R. 586.

[3] [1943] K.B. 1, 4.

[4] (1950) 34 Cr.App.R. 87.

I know of no case which says that that is not the proper course to take, apart from *Roberts'* case.[6] But authority for the course which the prosecution invite me to take, namely, to direct the trial of the preliminary issue, goes back to the days of Hale, and I am very much indebted to Mr. Elwyn Jones for providing me with an extract from Hale's Pleas of the Crown, which reads as follows: "If a man in his sound memory commits a capital "offence and before his arraignment he becomes absolutely mad, "he ought not by law to be arraigned during such his phrensy, "but be remitted to prison until that incapacity be removed. "The reason is that he cannot advisedly plead to the indictment."

The next authority which I think is of importance in considering this matter is *Reg.* v. *Berry*,[7] in which Kelly C.B. said: "Further, I believe it to have been the law from the earliest "times, that if it is found at the trial of a prisoner that he cannot "understand the proceedings, the judge ought to discharge the "jury and put an end to the trial, or order a verdict of not "guilty." Then he went on: "The jury here have expressly "found the prisoner incapable of understanding, and it needs no "argument to show that, under such circumstances, he ought "not to be convicted."

Lush J. said[8]: "I am of the same opinion. If it appears "at any time during the trial that the prisoner is of non-sane "mind, the proper course is to stop the trial and direct him to be "detained during the Queen's pleasure. On that I base my "judgment. Such course was adopted in the present case. I "understand the finding of the jury, that the prisoner was not "capable of understanding, and, as a fact, had not understood,

---

[5] 34 Cr.App.R. 87, 90.
[6] [1954] 2 Q.B. 329.
[7] (1876) 1 Q.B.D. 447, 451.
[8] Ibid.

"the nature of the proceedings, to mean that the prisoner has not "sufficient intellect to understand the nature of the proceedings."

That was a case which was tried in 1876, and in 1800 the Criminal Lunatics Act was passed. Mr. Norman Richards invites me to take the view that that Act is not mandatory. It is quite true to say, of course, that that Act does not say that a jury shall be empanelled and that the issue shall be tried whether a person is insane so that he cannot be tried, but, as I see it, it is a statute which can be said to be declaratory of the common law; certainly it is in conformity with the opinion expressed in Hale's Pleas of the Crown.

Section 2 of the Criminal Lunatics Act, 1800, provides: "if any person indicted for any offence shall be insane, and shall "upon arraignment be found so to be by a jury lawfully "impanelled for that purpose, so that such person cannot be "tried upon such indictment, . . . it shall be lawful for the "court before whom any such person shall be brought to be "arraigned or tried as aforesaid, to direct such finding to be "recorded . . ." It is not without interest to observe that the section goes on: "if any person charged with any offence shall "be brought before any court to be discharged for want of "prosecution, and such person shall appear to be insane, it shall "be lawful for such court to order a jury to be impanelled to try "the insanity of such person; and if the jury so impanelled shall "find such person to be insane, it shall be lawful for such court "to order such person to be kept in strict custody, in such place "and in such manner, . . ."

It appears to me that the law has always been that an insane person cannot be tried, and although it is with the most profound regret that I find myself in disagreement with Devlin J., nevertheless I cannot avoid it, and the conclusion I have arrived at is that, upon my attention being drawn to the fact that there is a preliminary issue, that issue is one which the court is obliged to try. That is based upon the fact, not only that there is provision for such procedure by the Criminal Lunatics Act, 1800, but that there is authority for that procedure going back as far as Hale.

For those reasons this objection fails and I order a jury to be empanelled to try the preliminary issue.

Solicitors: *Director of Public Prosecutions; Andrew, Thompson & Partners, Swansea.*

CHARTER *v.* SULLIVAN.

C. A.

[Plaint No. M. 506.]

1957
Feb. 5, 6, 25.

Jenkins, Hodson and Sellers L.JJ.

Damages—Sale of goods—Failure to accept and pay for goods—Delivery of motor-car refused by buyer—Sold to another purchaser—Whether dealer entitled to loss of profit on repudiated sale—Fixed retail price—" Available market"—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 50 (2) (3).

By section 50 (1) of the Sale of Goods Act, 1893: " Where the " buyer wrongfully . . . refuses to accept and pay for the goods, " the seller may maintain an action against him for damages for " non-acceptance. (2) The measure of damages is the estimated loss " directly and naturally resulting, in the ordinary course of events, " from the buyer's breach of contract. (3) Where there is an avail-" able market for the goods in question the measure of damages is " prima facie to be ascertained by the difference between the contract " price and the market or current price. . . ."

The defendant refused to accept delivery of a " Hillman Minx " motor-car which he contracted to buy from the plaintiff, a motor-car dealer, at the retail price fixed by the manufacturers. Within 10 days the plaintiff resold the car to another purchaser. In an action by the plaintiff for breach of contract, the county court judge awarded the plaintiff £97 15s., the loss of profit on the repudiated sale. The defendant appealed on the grounds that the true measure of damages was the difference between the market value and the contract price and that the plaintiff had not suffered any damage since he had subsequently resold the car for the agreed price:—

Held, that whether there was an " available market " within the meaning of section 50 (3) or not, the present case was one in which the general rule laid down by subsection (2) should be applied to the exclusion of subsection (3); accordingly, as the evidence showed that the plaintiff could sell all the " Hillman Minx " cars that he could get, he had not shown that he had suffered any " loss " directly and naturally resulting " from the defendant's breach and he was entitled only to nominal damages.

Thompson (W. L.) Ltd. v. *Robinson (Gunmakers) Ltd.* [1955] Ch. 177; [1955] 1 All E.R. 154 distinguished.

Per Jenkins L.J. I doubt if James L.J.'s observations in *Dunkirk Colliery Co.* v. *Lever* (1878) 9 Ch.D. 20, 24, 25, should be literally applied as an exhaustive definition of an " available " market " in all cases. On the other hand Upjohn J.'s definition of " available market " in *Thompson's* case (supra) is not entirely satisfactory. It is doubtful if there can be an " available market " for particular goods in any sense relevant to section 50 (3) unless those goods are available for sale in the market at the market or current price in the sense of the price fixed by reference to supply and demand. Section 50 (3) postulates that in cases to which it applies there would be or might be a difference between the contract

C. A.

1957

CHARTER v. SULLIVAN.

price and the market or current price, which could not be so where the goods could only be sold at a fixed retail price.

Per Sellers L.J. An "available market" must at least be a market in which the seller could, if he wished, sell the goods left on his hands. If it could be proved that there were in effect unlimited supplies of "Hillman Minx" cars and a limited number of buyers, then it would appear that the dealer could establish a loss of profit which could not be mitigated.

APPEAL from Judge Rawlins sitting at Aldershot County Court.

The following statement of the facts is taken from the judgment of Jenkins L.J.

The defendant, Ernest Benson Sullivan, appealed from a judgment given by Judge Rawlins at Aldershot County Court on October 16, 1956, whereby the judge awarded the plaintiff, Henry Alec Charter, a motor-car dealer, £97 15s. damages against the defendant for breach of a contract for the sale by the plaintiff to the defendant of a "Hillman Minx" motor-car. In his defence and at the trial of the action the defendant disputed the formation of any concluded contract for the sale to him by the plaintiff of the car in question, but on that issue the judge held against the defendant that a concluded contract was proved and from that pure finding of fact there was no appeal. The contract which the judge held proved was entered into on June 29 or 30, 1955, when the defendant called at the plaintiff's showroom and agreed to buy a new "Hillman Minx" de luxe saloon motor-car which the plaintiff had in stock, together with extras in the shape of a heater and wheel discs, at a total price of £773 17s. At that price the sale, if completed, would have given the plaintiff a profit of £97 15s., of which £90 2s. 6d. was attributable to the car and the balance to the extras. A term of the bargain was that the plaintiff was to take in part exchange at the price of £350 a "Commer" van belonging to the defendant. On or about July 2, 1955, the defendant found that another dealer would be prepared to give him, as he thought, better terms, and on July 5, 1955, he wrote to the plaintiff a letter in which he refused to take the car. Some seven or 10 days later the plaintiff resold the car to another purchaser named Wigley, for the same price as the defendant had agreed to pay, namely, £773 17s., including the extras which had been fitted at the defendant's request.

The "Hillman Minx" car was a product of the motor manufacturing organization known as the Rootes Group, and the plaintiff was an area dealer for that organization, covering the

North Hampshire area. In accordance with what was a usual practice in the trade, the retail price at which those cars might be sold was fixed by the manufacturers, and it followed that the profit realizable by a dealer on the sale of a new car of any given model remained constant.

No point was made on either side of the fact that the defendant was to give another vehicle in part-exchange, nor was any distinction drawn between the car itself and the extra items (a relatively small matter). The sale to the defendant could therefore be treated wholly as a sale for cash; and, although different considerations might apply to the extras as compared with the car itself, £773 17s. was treated as the fixed retail price simply of the car as supplied by the manufacturers and £97 15s. as the profit resulting from a sale of the car at that price, which was the footing on which the case was argued before the Court of Appeal.

The sole issue before the court concerned the measure of damages.

Dudley Collard for the defendant. The county court judge relied on *Thompson (W. L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*[1] and held that the present case came within that decision. But that case is wrongly decided or distinguishable on the facts. The common law position with regard to damages for wrongful refusal to accept delivery of goods is now set out in section 50 of the Sale of Goods Act, 1893: see Benjamin on Sale, 8th ed., p. 816. The judgment in *Thompson's* case[1] was based on two grounds: first, that there was not an available market, and Upjohn J.[2] took the narrow view of "available market" expressed by James L.J. in *Dunkirk Colliery Co.* v. *Lever*[3]; secondly, even if Upjohn J. was at liberty to construe the phrase more widely, there was not an available market because the case was argued on the assumption that it was difficult to dispose of "Vanguard" cars.

With regard to the first point, Upjohn J. was wrong in limiting the conception of "available market" to James L.J.'s definition of the words as meaning public demand. Section 50 (3) refers to the market or current price, and that is significant, since current price might well be the price fixed by the manufacturers. As to the second point, Upjohn J.'s decision is distinguishable from the present case because it is admitted that the plaintiff could sell all the "Hillman Minx" cars he could get. The fact that the price of the car was fixed by the manufacturers is not important;

---

[1] [1955] Ch. 177; [1955] 1 All E.R. 154.

[2] [1955] Ch. 177, 185, 187.

[3] (1878) 9 Ch.D. 20, 25.

the matter to be inquired into is the availability of purchasers. [Reference was made to *In re Vic Mill Ltd.*,[4] *Charrington & Co. Ltd.* v. *Wooder*[5] and *Marshall & Co.* v. *Nicoll & Son.*[6]]

[SELLERS L.J. The statute does appear to envisage a moving price.]

[HODSON L.J. James L.J. in the *Dunkirk Colliery* case[7] is certainly talking about fluctuating demands.]

Public demand constitutes a market, but the selling of new cars does not exclude "available market," which means a public demand at least equal to the supply. Read in that way it makes sense of section 50 and is consistent with the plaintiff's duty to mitigate his damage. The fact that he sold the car quickly is corroborative evidence that there was a public demand for the car.

[SELLERS L.J. On your argument, the rule in section 50 (2) should apply to you if you are right on the facts?]

The rule in subsection (3) is really only a way of applying subsection (2) in special circumstances.

[JENKINS L.J. The plaintiff says that he has suffered damage because instead of selling two cars he sold only one.]

Thompson's case[8] was not concerned with a resale and can be distinguished. There is no binding authority showing that where a seller resells within a week or so he is entitled to recover his full loss of profit on the abortive sale. The only similar case is the South Australian case of *Cameron* v. *Campbell & Worthington Ltd.*,[9] which can be distinguished on the passage: ". . . it is "notorious that purchasers are not readily to be found." In *Mason & Risch Ltd.* v. *Christner*[10] it was not a loss of profit on resale which was allowed but merely expenses incidental to the resale. It is significant that the American case of *Stewart* v. *Hansen*[11] and *Thompson's* case[12] are both cases where the seller returned goods to the wholesalers and there was only one opportunity to make a profit. [Reference was also made to *Brown* v. *Buck.*[13]] *In re Vic Mill Ltd.*[14] does not really assist; it concerned a special order where there was an element of work and labour involved and the specially ordered goods were altered for resale. The principle enunciated by Salter J. in *British Stamp and Ticket*

---

[4] [1913] 1 Ch. 465.

[5] [1914] A.C. 71; 30 T.L.R. 176.

[6] 1919 S.C.(H.L.) 129.

[7] 9 Ch.D. 20, 25.

[8] [1955] Ch. 177.

[9] [1930] S.A.S.R. 402, 405.

[10] (1920) 48 O.L.R. 8; 54 D.L.R. 653.

[11] (1923) 44 A.L.R. 340.

[12] [1955] Ch. 177.

[13] [1934] 4 D.L.R. 446.

[14] [1913] 1 Ch. 465.

Automatic Delivery Co. Ltd. v. *Haynes*[15] can be applied to the present case and is in the defendant's favour.

If *Thompson's* case[16] is simply authority for the proposition that when a seller returns a car to a wholesaler he is entitled to reclaim his loss of profit on an abortive sale, then it is rightly decided because his returning the car to the wholesaler is the best possible evidence that there is no available market for the car. But if it is sought to extend the principle to cover a case where there has been a prompt resale, as in the present case, then it is a wrong decision. And that would be so whatever the state of the market and whether subsection (2) or subsection (3) of section 50 of the Act of 1893 is the appropriate way of looking at the measure of damage. The principle of law is correctly stated in Leake on Contracts, 8th ed., at p. 822, and, if applied to the facts of the present case, the plaintiff can recover no more than nominal damages.

Guy Aldous Q.C. and *Stanley Waldman* for the plaintiff. With regard, first, to the attempt to distinguish *Thompson's* case,[17] the judge found that "Hillman Minx" cars could have been obtained within 10 days and that the plaintiff would have sold another car to Wigley if there had been no repudiation. That negatives the inference of fact that there were so many customers and so few cars that the plaintiff could not have sold an extra car if there had been no repudiation. *Thompson's* case[17] applies because the plaintiff has made one less sale than he would have done if there had been no repudiation.

The question of law is whether the basic principle of estimating damages in section 50 (2) of the Sale of Goods Act is the general rule. As expressed in *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.*,[18] the plaintiff is to be placed in as good a position as if the contract had been performed in so far as money can do it. [Reference was made to *Watts, Watts & Co. Ltd.* v. *Mitsui & Co. Ltd.*[19]] Section 50 really sets out the basic principle of law. If the plaintiff is to be put in the same position as if the contract had been performed, then he should be awarded the profit which he would have made if the sale had gone through. He is of course under a duty to mitigate his loss and cannot say that the defendant owed him the whole value of the car. By reselling, the plaintiff had reduced the loss of the whole value of the car to the loss of profit which he would otherwise have made, and that is the proper estimate of damage. If it is established that the plaintiff has lost the extra profit, then subsection (2) is the relevant subsection and subsection (3) does not apply. If the plaintiff has not lost a profit, then subsection (3) is irrelevant because he could not get any damages. Subsection (3) is only a prima facie rule, as Upjohn J. said in *Thompson's* case,[20] and is always subservient to the general rule in subsection (2). It applies, no doubt, to the case of a person seeking to sell goods, e.g., a farmer selling corn or a shipper selling grain ex a particular ship, where the seller has only a certain amount to sell, and if he finds another purchaser at the same price he suffers no loss. That is quite different from a car seller. In *British Stamp and Ticket Automatic Delivery Co. Ltd.* v. *Haynes*[21] they had not mitigated their damages as they should have done. *In re Vic Mill Ltd.*[22] is conclusive authority on this point. It is applicable irrespective of whether there is an available market; if the plaintiff can show that he has lost additional profit from the defendant's breach he is entitled to recover it. As soon as that car has been sold to a customer who would have bought another car, then the sum of damages becomes quantified. The point of section 50 (3) is that there must be some place where a person can send the goods for sale or buy goods in substitution. "Available market" would not be appropriate to a Government store, for example, where goods are purchased and sold at specified prices. A market is a place where prices are fixed by negotiation. A possible consideration is that a market may be different if you want to sell or if you want to buy. If there has been a loss of profit by the seller, it is recoverable: Halsbury's Laws of England, 2nd ed., vol. 29, pp. 191, 192.]

---

[15] [1921] 1 K.B. 377, 380.

[16] [1955] Ch. 177.

[17] Ibid.

[18] [1912] A.C. 673, 689.

[19] [1917] A.C. 227, 241; 33 T.L.R. 262.

If the quota of cars received by the plaintiff was less than the number of customers, then the plaintiff loses nothing. If he can show that goods were readily available so that he can meet all demands, then if one customer repudiates, and he mitigates by selling to another, he has lost his profit. So long as the demand does not amount to the supply, then there has been no loss of profit. The question here is, has it been proved that the supply is not less than the demand? The plaintiff has to prove that he has lost a sale. The county court judge decided that the plaintiff would have sold another car and made a profit of £97 if the defendant had not repudiated. That is an explicit finding of fact. If it is not explicit it can be implied. The court should assume from that fact that the judge was satisfied that there was no shortage and that the plaintiff could obtain a car simply by placing the order. If the defendant is to succeed he has to show that the judge's conclusions of fact are wrong and that the plaintiff could not get "Hillman Minx" cars when he wanted. Section 50 (2) is not what was in the reasonable contemplation of the parties, but what damage naturally resulted to the seller. Section 50 (3) does not apply any way if the damage under section 50 (2) is greater than that which would be found if one adopted the test in subsection (3). Subsection (3) is only a prima facie test, and in any event it does not apply because there is no available market. The only available market is the plaintiff's own shop, and that is not what is contemplated in subsection (3). The proper definition is to be found in the *Dunkirk Colliery* case.[23] The principle laid down in *Thompson's* case[24] is right and the appeal should be dismissed.

---

[20] [1955] Ch. 177, 188.
[21] [1921] 1 K.B. 377.
[22] [1913] 1 Ch. 465.

Collard in reply. The onus is clearly on the plaintiff to prove that he has suffered substantial damage. The evidence of the plaintiff's sales manager that he could have sold another car to Wigley is either his opinion or hearsay. The real key to the situation is that suggested by Sellers L.J., that one has to look at the contemplation of the parties. There is a similar provision in the case of a buyer's measure of damages for breach of warranty: section 53 (2). A buyer may resell goods and lose his profit because of breach of warranty on the part of the seller; the buyer cannot recover his loss of profit on the resale unless resale was contemplated (unless there are special circumstances under section 54). Therefore that type of loss is not a direct loss as provided for in section 53 (2), because if it were direct it would not be necessary to prove that resale was in the contemplation of the parties. In other words, loss on resale is an indirect loss if incurred by a buyer. The same construction is to be put on section 50 (2). The loss should be regarded as indirect and recoverable only if it was within the contemplation of the parties. To succeed, the plaintiff would have to show that it was within the contemplation of himself and the defendant. Here the defendant could not possibly have contemplated the loss even if it were established as a matter of fact. Prima facie there is no evidence of loss because there was an almost immediate resale.

Cur. adv. vult.

---

[23] 9 Ch.D. 20, 25.

[24] [1955] Ch. 177.

C. A.
1957

CHARTER
v.
SULLIVAN.

February 25. The following judgments were read.

JENKINS L.J. stated the facts as set out above, and continued: I turn now to consider what, on the undisputed facts of the case, is in the eye of the law the true measure of the damages, if any, over and above merely nominal damages, which the plaintiff has suffered through the defendant's failure to take and pay for the car he agreed to buy.

Consideration of this question must inevitably begin with a reference to section 50 of the Sale of Goods Act, 1893. [His Lordship read section 50[1] and continued:] Mr. Collard, for the defendant, argued that in the present case there was an available market for "Hillman Minx" de luxe saloon cars within the meaning of section 50 (3) of the Act, and accordingly that the measure of damages ought, in accordance with the prima facie rule laid down by that subsection, to be ascertained by the difference between the contract price and the market or current price at the time of the defendant's refusal to perform his contract.

The result of this argument, if accepted, would be that the plaintiff could claim no more than nominal damages, because the market or current price could only be the fixed retail price, which was necessarily likewise the price at which he sold to the defendant and resold to Wigley.

But the plaintiff is a motor-car dealer whose trade for the present purpose can be described as consisting in the purchase of recurrent supplies of cars of the relevant description from the manufacturers, and selling the cars so obtained, or as many of them as he can, at the fixed retail price. He thus receives, on each sale he is able to effect, the predetermined profit allowed by the fixed retail price, and it is obviously in his interest to sell as many cars as he can obtain from the manufacturers. The number of sales he can effect, and consequently the amount of profit he makes, will be governed, according to the state of trade, either by the number of cars he is able to obtain from the manufacturers, or by the number of purchasers he is able to find. In the former case demand exceeds supply, so that the default of one purchaser involves him in no loss, for he sells the same number of cars as he would have sold if that purchaser had not defaulted. In the latter case supply exceeds demand, so that the default of one purchaser may be said to have lost him one sale.

---

[1] Sale of Goods Act, 1893, s. 50: "(1) Where the buyer wrongfully "neglects or refuses to accept and "pay for the goods, the seller may "maintain an action against him "for damages for non-acceptance. "(2) The measure of damages is the "estimated loss directly and naturally "resulting, in the ordinary course of "events, from the buyer's breach of "contract. (3) Where there is an "available market for the goods in "question the measure of damages is "prima facie to be ascertained by "the difference between the contract "price and the market or current "price at the time or times when the "goods ought to have been accepted, "or, if no time was fixed for accept-"ance, then at the time of the refusal "to accept."

Accordingly, it seems to me that even if there was within the meaning of section 50 (3) an available market for cars of the description in question, and even if the fixed retail price was the market or current price within the meaning of the same subsection, the prima facie rule which it prescribes should be rejected in favour of the general rule laid down by subsection (2); for it does not by any means necessarily follow that, because the plaintiff sold at the fixed retail price to Wigley the car which the defendant had agreed to buy at the selfsame fixed retail price, but refused to take, therefore the plaintiff suffered no "loss directly and naturally resulting, in the ordinary course "of events" from the defendant's breach of contract.

This makes it strictly unnecessary to decide whether there was in the present case an available market for cars of the description in question within the meaning of section 50 (3). But I would find it difficult to hold that there was. Given default by some purchaser of one of his cars of the relevant description, the plaintiff's only alternative mode of disposal would be to sell it at the fixed retail price to some other purchaser. He could endeavour to find another purchaser by displaying the car in his saleroom, circularising or canvassing old customers or the public at large, and advertising by posters or in newspapers. The car would obviously be of interest to retail customers only (i.e., the car-using public as distinct from the trade) and any purchaser he might succeed in finding would necessarily have to be a purchaser at the fixed retail price. At that price there might be no takers, in which case the plaintiff would be left with the car on his hands. Section 50 (3) seems to me to postulate a market in which there is a market or current price, i.e., a price fixed by supply and demand at which (be it more or less than the contract price) a purchaser can be found. If the only price at which a car can be sold is the fixed retail price and no purchaser can be found at that price, I do not think it can reasonably be said that there is a market or current price or that there is an available market. If the state of the trade were such that the plaintiff could sell at the fixed retail price all the cars he could get, so that the defendant's default did not result in the plaintiff effecting one sale less than he would otherwise have effected, it may well be that the plaintiff could not make out his claim to anything more than nominal damages. I am, however, inclined to think that this would not be on account of the necessary equality of the contract price and the fixed retail price at which alone the car could be sold, taken for the present purpose as the market or current price within the meaning of section 50 (3), but because on an application of the general principle laid down by section 50 (2) the plaintiff would be found to have suffered no damage.

In *Thompson (W. L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*[2] Upjohn J. had before him a claim for damages in a case resembling the present case to the extent that the damages were claimed in respect of the defendants' refusal to perform a contract with the plaintiffs for the purchase from the plaintiffs of a car (in that instance a "Standard Vanguard" car) which, like the car in the present case, could only be sold by the plaintiffs at a fixed retail price. It is, however, important to note that the case to which I am now referring proceeded on certain admissions, including an admission to the effect that in the relevant district at the date of the contract (which was also the date of the breach) "there was no shortage of 'Vanguard' "models to meet all immediate demands in the locality," which I take to mean, in effect, that the supply of such cars exceeded the demand. In these circumstances the plaintiffs by agreement with their suppliers rescinded their contract with them, and returned the car. In the ensuing action the plaintiffs claimed from the defendants damages amounting to the profit the plaintiffs would have made on the sale of the car to the defendants if the defendants had duly completed their purchase of it, and the judge held them entitled to those damages. The defendants raised the same argument as has been raised by the defendant in the present case, namely, that there was an available market for a car of the kind in question, within the meaning of section 50 (3), that there was a market or current price in the shape of the fixed retail price, and that as the fixed retail price was the same as the contract price the plaintiffs had suffered no damage. In the course of his judgment Upjohn J.[3] referred to James L.J.'s definition of a market in *Dunkirk Colliery Co.* v. *Lever*.[4]

---

[2] [1955] Ch. 177; [1955] 1 All E.R. 154.

[3] [1955] Ch. 177, 185.

[4] (1878) 9 Ch.D. 20, 24, 25.

C. A.
1957

CHARTER
v.
SULLIVAN.

Jenkins L.J.

James L.J. said this[4]: "Under those circumstances the only "thing that we can do is to send it back to the referee with an "intimation that we are of opinion upon the facts (agreeing with "the Master of the Rolls in that respect), that the facts do not "warrant the application of the principle mentioned in the award, "namely, that there was what may be properly called a market. "What I understand by a market in such a case as this is, that "when the defendant refused to take the 300 tons the first week "or the first month, the plaintiffs might have sent it in waggons "somewhere else, where they could sell it, just as they sell corn "on the Exchange, or cotton at Liverpool: that is to say, that "there was a fair market where they could have found a pur-"chaser either by themselves or through some agent at some "particular place. That is my notion of the meaning of a "market under those circumstances." Upjohn J.[5] also referred to the Scottish case of *Marshall & Co.* v. *Nicoll & Son*,[6] where it was held in the Court of Session that there was an available market within the meaning of section 51 (3) of the Sale of Goods Act, 1893, for annealed steel sheets although they were not kept in stock and were not purchasable in the open market. In the House of Lords the decision was affirmed, but their Lordships would seem to have been equally divided on the question whether there was an available market for the goods. In this state of the authorities, the judge felt himself bound by *Dunkirk Colliery Co.* v. *Lever*,[7] and held, in effect, that James L.J.'s definition in that case prevented him from holding that in the case then before him there was an available market within the meaning of section 50 (3).

Upjohn J.[8] went on to propound a more extended meaning for the phrase "available market" in these terms: "Had the "matter been res integra I think that I should have found that "an 'available market' merely means that the situation in the "particular trade in the particular area was such that the "particular goods could freely be sold, and that there was a "demand sufficient to absorb readily all the goods that were "thrust on it, so that if a purchaser defaulted, the goods in "question could readily be disposed of." He went on to say, in effect, that in the case then before him there was no available market because the supply of "Vanguard" cars at the material time exceeded the demand.

---

[5] [1955] Ch. 177, 186.
[6] 1919 S.C.(H.L.) 129.
[7] 9 Ch.D. 20.
[8] [1955] Ch. 177, 187.

C. A.
1957

CHARTER
v.
SULLIVAN.

Jenkins L.J.

I doubt if James L.J.'s observations in *Dunkirk Colliery Co.* v. *Lever*[9] should be literally applied as an exhaustive definition of an available market in all cases. On the other hand, I do not find Upjohn J.'s definition[10] entirely satisfactory. I will not, however, attempt to improve upon it, but will content myself with the negative proposition that I doubt if there can be an available market for particular goods in any sense relevant to section 50 (3) of the Sale of Goods Act, 1893, unless those goods are available for sale in the market at the market or current price in the sense of the price, whatever it may be, fixed by reference to supply and demand as the price at which a purchaser for the goods in question can be found, be it greater or less than or equal to the contract price. The language of section 50 (3) seems to me to postulate that in the cases to which it applies there will, or may, be a difference between the contract price and the market or current price, which cannot be so where the goods can only be sold at a fixed retail price.

Accordingly, I am of opinion that whether there was in this case "an available market" within the meaning of section 50 (3) or not, it is a case in which section 50 (2) should be applied to the exclusion of section 50 (3).

It remains, therefore, to ascertain the loss (if any) "naturally "resulting, in the ordinary course of events" from the defendant's breach of contract, and the measure of that loss must, in my opinion, be the amount, if any, of the profit the plaintiff has lost by reason of the defendant's failure to take and pay for the car he agreed to buy. This accords with the view taken by Upjohn J. in *Thompson (W. L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*,[11] and also with the principle stated in *In re Vic Mill Ltd.*[12] which Upjohn J. applied.

I should next refer to evidence of which I have deferred consideration earlier in this judgment.

The plaintiff's sales manager, Winter, gave evidence, from the judge's abbreviated note of which I extract the following. From examination-in-chief: "I'm certain we would have sold this "purchaser" (i.e., Wigley) "another 'Hillman Minx' if not "this one" (i.e., the one the defendant had rejected). From cross-examination: "No other 'Hillman Minx' in stock I think. "If defendant had taken car we would have ordered one from "stock" (I think this must mean from the manufacturers' stock)

---

[9] 9 Ch.D. 20, 25.

[10] [1955] Ch. 177, 187.

[11] [1955] Ch. 177.

[12] [1913] 1 Ch. 465.

"—it would have taken a week to 10 days to get one. Can sell "all 'Hillman Minx' we can get. We are Rootes Group area "dealers for this area. We have lost the sale of a car—sold "same price to Wigley."

In the brief record of his judgment with which we have been provided, the judge in terms expressed his acceptance of Winter's evidence as to selling Wigley "another 'Hillman Minx' if not "this one," and as to being able to order one from stock and obtain it in seven to 10 days; but he made no reference to what appears to me to be the vital passage in Winter's evidence: "Can "sell all the 'Hillman Minx' we can get.

Notwithstanding Mr. Aldous's submission to the contrary on the plaintiff's behalf, I think we should assume that the judge accepted as accurate the plaintiff's sales manager's own description of the state of the plaintiff's business in "Hillman "Minx" cars. Moreover, I think we should take that description as signifying, according to the ordinary meaning of the language used, that the plaintiff could always find purchasers for all the "Hillman Minx" cars he was able to get.

Mr. Collard objected to Winter's statement to the effect that he was certain that he could have sold another "Hillman Minx" to Wigley if Wigley had not bought the one which the defendant had rejected. Mr. Collard said that this was mere hearsay and opinion and inadmissible as evidence, and that Wigley should have been called to prove his intention. I think this is hypercritical. The judge described Winter as a very experienced salesman and expressly accepted this part of his evidence. I therefore see no reason to doubt the correctness of Winter's assessment of Wigley's intention, and I accept it accordingly.

I have not overlooked the evidence given by the plaintiff's storeman Harold Charles Charter, and noted by the judge as "Delivery 'Hillman Minx' not easy at this time—might have "to wait some time," but I attach no importance to it because, as will hereafter appear, the judge preferred the evidence of Winter.

The matter therefore stands thus. If the defendant had duly performed his bargain the plaintiff would have made on that transaction a profit of £97 15s. The calculation accordingly starts with a loss of profit, through the defendant's default, of £97 15s. That loss was not cancelled or reduced by the sale of the same car to Wigley, for if the defendant had duly taken and paid for the car he agreed to buy, the plaintiff could have sold another car to Wigley, in which case there would have been two sales and two profits: see *In re Vic Mill Ltd.*,[13] and particularly *per* Hamilton L.J.[14] and Buckley L.J.[15] But the matter does not rest there. The plaintiff must further show that the sum representing the profit he would have made if the defendant had performed his contract has in fact been lost. Here I think he fails, in view of Winter's evidence to the effect that the plaintiff could sell all the "Hillman Minx" cars he could get.

I have already expressed my opinion as to the meaning of this statement. It comes, I think, to this, that according to the plaintiff's own sales manager the state of trade was such that the plaintiff could always find a purchaser for every "Hillman Minx" car he could get from the manufacturers; and if that is right it inevitably follows that he sold the same number of cars and made the same number of fixed profits as he would have sold and made if the defendant had duly carried out his bargain.

Upjohn J.'s decision in favour of the plaintiff dealers in *Thompson's* case[16] was essentially based on the admitted fact that the supply of the cars in question exceeded the demand, and his judgment leaves no room for doubt that if the demand had exceeded the supply his decision would have been the other way.

In dealing with the present case we were put in some difficulty by the appellant's failure to perform the duty laid upon him by the R.S.C., Ord. 58, r. 20 (4), of obtaining from the judge and furnishing to this court a copy of the judge's note made under section 108 of the County Courts Act, 1934, of the question of law involved in the present appeal. We accepted as the best available substitute a short note of the arguments and judgment taken by the plaintiff's solicitor and submitted by him to the judge, who signed it on November 9, 1956, with the note "This appears to me accurately to represent my findings." The relevant part of this note reads thus: "It was Mr. Jaye's "contention" (Mr. Jaye was the defendant's solicitor) "that "because the car had been sold to Mr. Wigley within seven to 10 "days the plaintiff had lost no profit. He further submitted "that the plaintiff had not shown that there was no" (the note here says "an" but clearly "no" was intended) "available "market to bring the case within *Thompson (W. L.) Ltd.* v. "*Robinson (Gunmakers) Ltd.*[17] Mr. Winter has said it would

---

[13] [1913] 1 Ch. 465.
[14] Ibid. 473.
[15] Ibid. 474.
[16] [1955] Ch. 177.
[17] Ibid.

"have taken a week to 10 days to obtain another and Mr. "Charter had said delivery of 'Hillman Minx' not easy at that "time. Mr. Jaye stated further that the plaintiff had pleaded "that he has lost the profit on this particular car but in fact "the car had been sold. I applied for leave to amend the "particulars of claim by deleting the words 'the said' and "adding 'a second.' Mr. Jaye raised no objection to the "amendment and the judge granted leave. I was not called "upon by the judge to reply. In a very short judgment His "Honour stated he was satisfied the plaintiff had made out "his case, and that the case came within the decision in *Thompson (W. L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*[17] . . . He "accepted the evidence of Mr. Winter who he considered to be "a very experienced salesman when he said he had some difficulty in getting Mr. Wigley to take the car, because it had "already been registered, and that if he had not sold this car "to Mr. Wigley, he would have sold another one to him. Mr. "Charter did say that delivery of 'Hillman Minx' was not "easy at this time but he was only a storeman employed by "the plaintiff and the delivery position of cars was not within "his knowledge—he accepted what Mr. Winter had said that "he could have ordered one from stock and obtained it in a "week to 10 days."

It will be seen that this note of the judgment contains no reference to Winter's statement "Can sell all 'Hillman Minx' "we can get."

Mr. Aldous submitted that if the plaintiff's solicitor's note signed by the judge was to do duty as the judge's note, we must deal with the case exclusively on the findings stated in that note, and that on those findings there was evidence on which the judge could properly hold that the plaintiff had suffered damage in the shape of his loss of the profit he would have made on the car which he could have obtained from the manufacturers and sold to Wigley if the defendant had duly taken the car he agreed to buy but which owing to his default was sold to Wigley. But as I have already said, I think we must treat as part of the evidence before the judge, and accepted by him as true, Winter's statement "Can sell all 'Hillman Minx' we can get." It is clear that the judge accepted Winter's evidence as a whole, and he said nothing to suggest that he rejected this part of it. As appears from what I have said above, I think the meaning of Winter's statement is plain. It is the evidence of the plaintiff's own sales manager as to the state of the trade, and if accepted as accurate, as I think it should be accepted, it seems to me completely destructive of the plaintiff's case on damages.

---

[17] [1955] Ch. 177.

The materials before the court leave a good deal to be desired. The parties were no doubt preoccupied with the issue of contract or no contract, and the argument in regard to damages based on *Thompson's* case [18] was perhaps something of an afterthought, as is suggested by the belated (and as I think unnecessary) amendment of the points of claim by substituting "a second motor-car" for "the said motor-car" in the first item of damage claimed.

But it was for the plaintiff to prove that he did in fact sustain the loss of profit claimed, and this to my mind he wholly failed to do. The mere assertion by Winter "We have lost "sale of a car" is clearly not enough, particularly when read in conjunction with his "Can sell all 'Hillman Minx' we can "get." Accordingly there was in my view no evidence on which the judge could properly hold that the plaintiff had suffered the damage claimed, and I would allow this appeal.

HODSON L.J. I agree that the appeal should be allowed and with the order proposed on the ground that the plaintiff has failed to prove a loss beyond that which has been recouped by the resale of the motor-car in question.

SELLERS L.J. The judgment from which the defendant, the buyer, appeals found and established that on or about June 29 or 30, 1956, the defendant agreed to buy from the plaintiff a new "Hillman Minx" saloon motor-car and that on July 5, 1956, when the car was licensed and ready for delivery as arranged, the defendant repudiated the agreement and refused to take delivery because he had found that he could get a better bargain elsewhere for his "Commer" van which was to be taken in part payment of the price.

The only question on the appeal is as to the damages the plaintiff is entitled to receive for the non-acceptance of the car by the defendant. The plaintiff claimed the loss of profit on the sale. The defendant denied that there had been in the circumstances any profit lost and alleged that nominal damages only were recoverable.

---

[18] [1955] Ch. 177.

The car rejected by the defendant was put back into the plaintiff's showroom and was sold within a week or 10 days to another customer at the same fixed retail price. This effective sale resulted in the normal profit to the plaintiff, but he claims that he has nevertheless lost a profit, for he would have sold and delivered, but for the defendant's default, two cars instead of one and would have made two profits instead of one.

Having regard to the nature of this claim singularly little evidence was directed to the issue.

The plaintiff was the area dealer for the Rootes Group, who manufacture the "Hillman Minx" cars, and was required to sell them at not less than their fixed price for a retail sale. He had only one "Hillman Minx" in stock, but if the defendant had taken delivery he would have ordered another one and would have expected a replacement within a week or 10 days. The sales manager said that he was certain he would have sold the new purchaser another "Hillman Minx" if the one in question had not been available (by reason of the defendant's default).

A seller's loss of profit on a sale may clearly directly and naturally result in the ordinary course of events from a buyer's wrongful neglect or refusal to accept and pay for the goods bought. But it may be that the seller is so circumstanced that he could sell the goods elsewhere either at the same price as the contract price or at some lesser price which would either extinguish or minimise the loss to the seller and therefore the damages which the defaulting buyer will have to pay.

Counsel for the defendant placed great reliance on section 50 (3) of the Sale of Goods Act, 1893, and submitted that there was an available market for the car at the one fixed or current price, which was also the contract price, and therefore there could be no loss of profit recoverable as that subsection established the measure of damages.

No evidence was given as to anything the plaintiff might have done to bring about a resale of the rejected car except that which he did, namely, place it in his showroom and await a new buyer. Having regard to his success within 10 days the submissions on the meaning of "available market" seem to me to be somewhat theoretical and academic.

The Act does not attempt to define a market, and it may be conceded that one can exist in a variety of circumstances and apart, of necessity, from a defined place, but since its trading has to serve as a factor in measuring the damages it must at least be a market in which the seller could, if he wished, sell

C. A.
1957

Charter
v.
Sullivan.

Sellers L.J.

the goods left on his hands. At the time of the defendant's refusal to accept, June 5, 1956, it has not been shown that there was any real market where the rejected car could have been offered for sale and sold. There was no available market. No doubt the current retail price was known and ascertained but there was no immediate buyer.

The plaintiff had the duty to act reasonably and mitigate the damages as far as he reasonably could. What he did resulted in a resale at the contract price, but the question is whether that resale mitigated his loss, and the same question would arise if a sale could have been made in an "available market." The plaintiff's case is that by reason of the defendant's non-acceptance of the car he had bought the plaintiff has lost the profit he would have earned and that the resale of the car to another customer did not and could not in the circumstances give him a substituted profit.

He claims that he could have sold a "Hillman Minx" to the defendant and another to the new purchaser and made two profits, whereas he has made only one and lost irreplaceably the profit on the defendant's transaction (or at least on one of the two transactions).

If a seller can prove that a profit has been irretrievably lost on a sale of goods by the buyer's default it would in my opinion be recoverable as damages in accordance with section 50 (2). But where there has in fact been a resale of the goods, the seller has the burden of proving a loss of profit beyond that which on the face of it has been recouped in whole or in part by the resale.

In my view the plaintiff has failed to give adequate proof of such a loss in this case. The sales manager for the plaintiff said that he had lost the sale of a car, but he also said that he could sell all the "Hillman Minx" cars he could get.

It was argued that the statement that he could sell all the cars he could get ought not to be taken literally, but should be qualified in some way. Even if that is so, which I see, on the evidence, no reason to concede, it does not establish affirmative evidence that the plaintiff could get all the "Hillman Minx" cars he could sell.

If it could be proved that there were in effect unlimited supplies of "Hillman Minx" cars and a limited number of buyers in the circumstances in which a dealer was trading then it would appear that the dealer could establish a loss of profit which could not be mitigated. On the other hand most dealers in cars (and in many other commodities), it might be visualised, either have a quota fixed by their supplier or a supply fixed by their own trading limits governed by their scope of trading. In such a case, if in a given trading period all the goods the dealer had available for sale had been sold, or would in all probability be sold, then the fact that one or more purchasers had defaulted and had been or would be replaced by others would not reduce the dealer's maximum profits.

The matter cannot of course be worked out ad infinitum but would be decided on the probabilities of the case and having regard to the nature, extent and circumstances of the dealer's trading. If a dealer has 20 cars available for sale and 25 potential buyers he still would make his full profit if he sold the 20 cars notwithstanding that two or three purchasers defaulted.

In *Thompson (W. L.) Ltd.* v. *Robinson (Gunmakers) Ltd.*[19] Upjohn J. gave damages for loss of profit to dealers who had sold a "Vanguard" motor-car to the defendants who refused to take delivery The dealers had returned the vehicle to their suppliers, but the judge decided the case on the basis that the dealers had lost their bargain, that they had sold one car less than they otherwise would have done, which is the plaintiff's contention here.

It is important to note in that case[20] "that in the East "Riding of Yorkshire (the transaction actually took place in "Hull) at the time of the contract of sale there was no shortage "of 'Vanguard' models to meet all immediate demands in the "locality." On those facts the judge in my view was right in saying that the plaintiffs had lost a customer and thereby a profit. There was no point in their keeping the car and awaiting a resale as they could acquire a "Vanguard" car to meet each purchaser as he presented himself. They could not, in other words, avoid their loss. The reasoning of Hamilton L.J. and Buckley L.J. in *In re Vic Mill Ltd.*[21] quoted by the judge is singularly apt and adaptable to this case. Upjohn J.[22] states the possible extreme situations: one, where in the case of rejection "if any purchaser fell out there were many waiting to "take his place"; the other, "But on the assumed facts "circumstances had changed in relation to 'Vanguard' motor-"cars, and in March of this year there was not a demand in "the East Riding which could readily absorb all the 'Vanguard' "motor-cars available for sale."

[19] [1955] Ch. 177.

[20] Ibid. 178.

[21] [1913] 1 Ch. 465, 473, 474.

[22] [1955] Ch. 177, 187.

C. A.
1957
Charter v. Sullivan.
Sellers L.J.

Whether the plaintiff could have proved a similar situation with regard to the "Hillman Minx" cars in his area I do not know, but I cannot find that it was either admitted or proved. It is for this reason that I would allow this appeal. There are two items in the damage claimed, loss of profit on a car heater and on wheel discs, both of which were ordered for the "Hillman "Minx" and for which £7 12s. 6d. in all is claimed. These items might stand on a different footing from the loss of profit of £90 2s. 6d. claimed for the loss of the sale of the car, but no such distinction was made either at the trial or on the appeal and I would therefore find the plaintiff entitled to 40s. nominal damages only.

Appeal allowed.

Solicitors: *Bateman & Co. for Foster, Wells & Coggins, Aldershot; Herrington & Carmichael, Aldershot.*

C. J. E.

1957
March 8.
McNair J.

FRANCIS *v.* YIEWSLEY AND WEST DRAYTON URBAN DISTRICT COUNCIL.

[1955 F. No. 2158.]

Town and Country Planning—Enforcement notice—Form—Validity of notice—Notice alleging development without permission—Permission for limited period granted by Minister—Effect of owner's failure to appeal to justices—Whether barred from questioning notice in High Court—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23 (2) (4), 24 (1) (3).

Statute—Construction—Jurisdiction of High Court—Not to be taken away save by clear words.

In February, 1949, the owner of land placed on the land caravans for residential purposes and applied to the local planning authority for permission to use the land for that purpose. Permission was refused and the owner appealed to the Minister, who allowed the appeal to the extent of permitting the use of the land as a caravan site for six months from February 22, 1950. In 1952 the planning authority served on the owner an enforcement notice stating that "whereas . . . the land . . . was developed by placing "thereon caravans for residential purposes and whereas such "development . . . was carried out without the grant of "planning permission required under Part III of the Town and

1957

FRANCIS
v.
YIEWSLEY
AND WEST
DRAYTON
URBAN
DISTRICT
COUNCIL.

"Country Planning Act, 1947.[1] Now therefore the" local planning authority "in exercise of the powers contained in sections 23 and 24 of the said Act hereby give you notice to remove all caravans from the site within 55 days of the date on which this notice takes effect." In an action by the owner for a declaration that the enforcement notice was ineffective on the ground that planning permission as required by the Act had been granted and because the notice did not specify the development alleged to have been carried out as required by section 23 (2) of the Act:—

Held, (1) that an enforcement notice was only required to state whether the development had taken place without permission or in breach of a condition and it was not necessary to state, in addition, the reasons why the act specified involved a breach; accordingly, the notice in the present case could not be attacked on that ground.

Dicta of Lord Cohen and Lord Evershed in *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.* [1957] A.C. 223, 245, 248, 249; [1956] 2 All E.R. 669 applied.

But (2) that once a local planning authority or the Minister had given permission, albeit limited, for a particular development, the development could not be said to have been carried out without permission, and as in the present case the Minister had given permission for six months the notice was invalid.

---

[1] Town and Country Planning Act, 1947, s. 23: "(2) Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of . . . permission . . . or, as the case may be, the matters in respect of which it is alleged that any . . . conditions . . . have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be. (3) Subject to the provisions of the next following subsection, an enforcement notice shall take effect at the expiration of such period (not being less than 28 days after the service thereof) as may be specified therein; . . . (4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing subsection, appeal against the notice to a court of summary jurisdiction. . . ."

S. 24: "(1) If within the period specified in an enforcement notice . . . any steps required by the notice to be taken (other than the discontinuance of any use of land) have not been taken, the local planning authority may enter on the land and take those steps, and may recover as a simple contract debt in any court of competent jurisdiction from the person who is then the owner of the land any expenses reasonably incurred by them in that behalf; and if that person, having been entitled to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled in proceedings under this subsection to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such an appeal. . . . (3) Where, by virtue of an enforcement notice, any use of land is required to be discontinued, or any conditions are required to be complied with in respect of any use of land . . . then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land . . . in contravention of the notice, he shall be guilty of an offence. . . ."

(3) That the fact that the owner, on being served with the notice, did not appeal to a court of summary jurisdiction under section 23 (4) did not debar him by reason of section 24 (3) or otherwise from applying to the court for relief; for it was a fundamental rule that a subject was to be deprived by a statute of a right of coming to the court only by clear words, and the indications in this statute were to a contrary effect; accordingly, the owner was entitled to the declaration sought.

Perrins v. *Perrins* [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075 distinguished.

ACTION.

The plaintiff, Kenneth John Roy Francis, who was the owner of premises known as "Riverside," Thorney Mill Road, West Drayton, claimed against the Yiewsley and West Drayton Urban District Council for a declaration that an enforcement notice by the council, under the Town and Country Planning Act, 1947, relating to that land, dated July 23, 1952, was invalid, and that the defendants had no power to serve the notice.

On or about February 1, 1949, the land was developed by placing certain caravans on the land for residential purposes. On March 1, 1949, the plaintiff applied to the defendants, as the local planning authority, for planning permission to use the premises as a caravan site. On May 10, 1949, the defendants refused that permission, and the plaintiff, pursuant to his rights under section 16 of the Act of 1947, appealed to the Minister, and on February 22, 1950, the Minister allowed the appeal, and in notifying the local authority of his decision stated that he felt no doubt that the decision of the council was justified. "He notes, however, "that there are at present some 16 occupied caravans on the site, "and he is of the opinion that the occupants of these caravans "should be given reasonable time in which to find alternative "sites or accommodation. For this reason alone, he has decided "to allow the appeal to the extent that he permits the use under "appeal for a period of six months from the date of this letter "[February 22, 1950], which is issued by the Minister as his "formal decision."

On July 23, 1952, the defendant authority served on the plaintiff the enforcement notice complained of, which was in these terms: "Whereas you are the owner and/or occupier of land "situate at south of and fronting Thorney Mill Road, West "Drayton, and bounded on the east and south side by the River

"Colne, and known as 'Riverside.' And whereas on or about "February 1, 1949, the land above described was developed by "placing thereon caravans for residential purposes. And whereas "such development before mentioned was carried out without "the grant of planning permission required under Part III of the "Town and Country Planning Act, 1947. Now therefore the "Urban District Council of Yiewsley and West Drayton on "behalf of the County Council of the Administrative County of "Middlesex, as local planning authority in exercise of the powers "contained in sections 23 and 24 of the said Act of 1947 hereby "give you notice to remove all caravans from the site within fifty-"five days of the date on which this notice takes effect. This "notice shall, subject to the provision of section 23 of the said "Act, take effect on the expiration of twenty-eight days after the "service thereof upon you. Dated July 23, 1952."

The plaintiff took no action upon that notice, either by removing the caravans from the site or by appealing against the notice to a court of summary jurisdiction under section 23 (4) of the Act, nor was any move taken by the defendant authority to prosecute the plaintiff under section 24 (3). On December 29, 1955, the plaintiff brought this action asking for the declaration that the enforcement notice was not effective because planning permission as required under Part III of the Act had already been granted for the development, and because the notice did not specify within the meaning of section 23 (2) the development alleged to have been carried out without the grant of planning permission.

Douglas Frank for the plaintiff. The enforcement notice is attacked on three grounds. First, that it is wrong because the form of allegation is misconceived. In 1950 planning permission was granted for six months, therefore the form of complaint should have been that the plaintiff had committed a breach of a condition. Secondly, the allegation that development was carried out in 1949 without permission is wrong, because by the Town and Country Planning General Development Order, 1950 (S.I. 1950, No. 728), Sch. I, the plaintiff was entitled to use the land as a caravan site for 28 days in any one year, and to show that there was a breach the allegation in the notice should have been that the plaintiff carried out development and continued to do so in excess of 28 days. Thirdly, the notice failed to specify the development as required by section 23 (2).

It is not alleged that the plaintiff carried out any material change in the use of the land. The placing of caravans on the land was not necessarily development unless the previous use of the land was specified in the notice. The enforcement notice was founded on the original refusal and not on the condition laid down by the Minister. If the council are right in their contentions it would mean that, even if permission had been granted by the Minister in perpetuity, the council could still serve an enforcement notice based on the alleged breach in February, 1949. But the council cannot rely on the original breach because of the Minister's permission.

[McNAIR J. Supposing the enforcement notice had been issued on March 1, 1950, during the six months' period permitted by the Minister?]

During that time the plaintiff would not be in breach, yet the notice would be true in so far as there was a breach on February 1, 1949. If there is a subsequent permission, any order, to avoid an absurd position, could only be made for breach of the subsequent permission.

As to the second point, the argument of Mr. Widgery in *Postill* v. *East Riding County Council* [2] is adopted. That was the converse of the present case. There the notice was held to be invalid because the true complaint was the carrying out of new development.

The local authority contend that by failing to appeal to the justices under section 23 (4) against the notice the plaintiff is now not entitled to apply to this court for relief. But the jurisdiction of the justices on such an appeal is set out in section 23 (4) (*a*) and it is clear that they have no jurisdiction to consider the validity of a notice. Therefore, even if the plaintiff had appealed to the justices, he could not have raised the point that at the material time he was not in breach of the condition. *Perrins* v. *Perrins* [3] is distinguishable. [*Swallow and Pearson* v. *Middlesex County Council* [4] was also referred to.]

Thirdly, the notice has not specified the development which is alleged to have been carried out without the grant of permission, as required by section 23 (2). The notice must allege either that operations have been carried out or a material change in the use of the land has been effected. The placing of caravans on the land is not necessarily a development; it is not building or other operations, and it is not a change of use unless the land was not used for that purpose before. Implication is not enough. The notice must state the change of use or operations or, at least, if it is a question of change of use, the previous use must be specified. [Reference was made to *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.*[5] and *Lincolnshire* (*Parts of Lindsey*) *County Council* v. *Wallace Holiday Camp Ltd.*[6]] In *Keats* v. *London County Council*[7] Parker J. said that the magistrate must assume that the notice is regular and his sole jurisdiction was to ascertain whether permission was granted or was not required. From section 12 (2), where "development" is defined, it is clear that the placing of caravans on the site is not necessarily development. It can only be development if there is a new use and that new use is alleged in the notice, as it was in *Keats'* case.[7] It does not follow from the notice that caravans were not previously on the land. The placing of fresh caravans on the land does not amount to a change of use within the meaning of the Act. It may be a technical point, but so are the points taken in the other cases on this subject. Any ambiguity in an enforcement notice is to be construed against the local authority.

---

[2] [1956] 2 Q.B. 386, 392; [1956] 2 All E.R. 685.

[3] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[4] [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580.

J. P. Widgery for the local authority. The notice complies with the statutory requirements. Alternatively, the plaintiff has lost his right to complain by not appealing to the justices under section 23 (4). The words used in the recitals of the notice make it clear what is the act that is to be done. It is only necessary to specify the act. By attaching sections 23 and 24 to the notice, as was done in this case, it is indicated sufficiently what the notice is about. By specifying the acts done by the owner, there is a sufficient specification of the development within section 23 (2). In *Keats'* case[7] the notice did not state the nature of the use, but it was held that it was not too vague. In the present case the notice identifies the development and shows the landowner what is complained of.

In *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.*[8] the enforcement notice bears a close resemblance to the present notice, each saying that there has been development by placing erections on the land, and Lord Morton of Henryton said[9] that he considered that the development to which the notice related was thus sufficiently identified. Lord Cohen in that case said [10] that the notice must bring home to the person on whom it was served whether the authority objected to development without permission or to failure to comply with conditions, and, secondly, if the objection was to development, that the development was alleged to be without permission. Lord Evershed [11] also referred to the requirements of the notice. In the present case, although the allegation in the notice may be imprecise, it is sufficiently clear to the recipient to leave him in no doubt what it is that is being complained of.

---

[5] [1957] A.C. 223; [1956] 2 All E.R. 669.

[6] [1953] 2 Q.B. 178; [1953] 1 All E.R. 1143.

[7] [1954] 1 W.L.R. 1357, 1361; [1954] 3 All E.R. 303.

[8] [1957] A.C. 223.

[9] Ibid. 238.

The General Development Order only deals with spasmodic use of land. Once the 28 days have been exceeded, that Order no longer applies.

The alternative submission is that, the plaintiff having received the notice, he could have gone to the justices and proved that he had permission and the justices would have quashed the notice. If he does not, then he cannot complain to this court: see *Perrins* v. *Perrins*.[12]

[McNAIR J. Lord Goddard C.J. in that case is dealing only with the defences open to the owner, not with the point which arises here.]

The plaintiff could have appealed to the justices and produced the permission. This is clearly a case in which it was open to him to appeal. By his statement of claim he says that the notice was ineffective because permission was already granted for the development. In other words, he is saying that the notice ought not to have been served because of the Minister's consent. It follows that if he had been prosecuted under section 24 (3), not having appealed to the justices, he could not have challenged the notice. So here it is not open to him to challenge the notice in this court by asking to have the notice declared invalid, for the notice remains valid to support a prosecution. Moreover, relief by declaration is not a remedy that should be resorted to until other methods have been used: see *Vine* v. *National Dock Labour Board*.[13] The Act having supplied the procedure, it should be used, and not proceedings for a declaration. Even if the plaintiff does obtain the declaration, the local authority can still prosecute him and he cannot then produce the permission. Unless there is something wrong on the face of the notice, the court has no jurisdiction to declare it ineffective. It may well be that, in a proper case, the court has jurisdiction to enjoin the local authority from proceeding with the notice to see that justice is done, but there is no jurisdiction to make a declaration that the notice is invalid when in fact it remains fully effective to support a prosecution.

---

[10] [1957] A.C. 223, 245.

[11] Ibid. 248, 249.

[12] [1951] 2 K.B. 414.

[13] [1956] 1 Q.B. 658; [1956] 1 All E.R. 1.

Frank replied.

McNAIR J. stated the facts and continued: The approach that one has to make to any of these questions as to the regularity of the steps taken under the Town and Country Planning Act, 1947, is stated by Viscount Simonds in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[1] as follows: "It was, in the first "place, contended that the Act was highly technical and, as it "encroached on private rights, the court must insist on strict and "rigid adherence to formalities. This, as a general proposition, "commands assent. . . ." Bearing that in mind, I approach the criticisms which are made by the plaintiff against this enforcement notice and the answers made. In the first place it is said by the plaintiff that whereas section 23 (2) of the Act of 1947 requires that "Any notice served under this section (hereinafter called an "'enforcement notice') shall specify the development which is "alleged to have been carried out without the grant of such "permission as aforesaid or, as the case may be, the matters in "respect of which it is alleged that any such conditions as "aforesaid have not been complied with," this notice does not contain the specification required by that subsection, and the main points taken in support of that submission are that if one looks at the notice itself one cannot find any allegation as to whether or not there has been a change of use in the land which alone would make it a development requiring permission, nor can one find in that notice any allegation that, to use the language of section 12 (2), it was a "material change in the use of any "buildings," and, accordingly, it is said, the plaintiff is not told by that notice what the real complaint is against him.

On that submission I have been referred to two cases, both oddly enough relied on by counsel on each side. In *Keats* v. *London County Council*,[2] the Divisional Court, in considering an appeal from magistrates under the Act, had to consider the contention that the notice in that case was too vague and did not contain sufficient specification of the complaint. The notice[3] alleged that certain development had been carried out after July 1,

---

[1] [1957] A.C. 223; [1956] 2 All E.R. 669.

[2] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

[3] [1954] 1 W.L.R. 1359.

1948, without the grant of permission by the county council. The alleged development specified by the notice was in the following terms: " 'Beginning the use of the land described in the Second " 'Schedule hereto for the purpose for which the same is now " 'used namely as an industrial building within the meanings of " 'the Town and Country Planning (Use Classes) Order, 1948, and " 'the Town and Country Planning (Use Classes) Order, 1950.' " In the leading judgment Parker J. said [4]: " The first [point taken] " is that in all these notices the description of the development " is too vague. Mr. Marshall has contended that it should at least " state the time of the development, the nature of the development, and the class into which the development falls. He " points out that the class is of some importance, because there " is no change of use within the meaning of the Act if premises " are used for a different purpose, provided it is within the same " class. On that point, if the wording had been merely, 'the use " 'of the land as an industrial building' there might well be " complaint that it was not specific enough; but this notice says: " 'for the purpose for which the same is now used.' It thus " becomes perfectly clear that the complaint is made with regard " to the current use at the time—which, in this case, was the use " by the firm of optical manufacturers." It seems to me that that judgment tends to support the proposition that it is sufficient to specify the use which is complained of, and it is not necessary to go further and say why it is alleged that that use constitutes a development.

In *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*,[5] to which I have already referred, the question which was considered by the House of Lords again was the question of validity of an enforcement notice which was challenged on rather similar grounds to the present, namely, that there was not sufficient specification of the development complained of. In that case again the question was whether the enforcement notice was in the form required by the Act. The decision was that, inasmuch as the notice did not make it clear whether what was complained of was developed before the Act of 1947, or a development after that Act, the notice was ineffective, but in dealing with the required contents of an enforcement notice there are passages in the speeches which I think assist me in my present consideration.

Lord Cohen said [6]: " Was this a good notice having regard to " the facts found which make it clear that the only breach of

---

[4] [1954] 1 W.L.R. 1361.

[5] [1957] A.C. 223.

[6] Ibid. 245.

"planning control which could be established was contravention "of 'previous planning control'? This question raises a matter "of construction of section 23 (2). As I read that section, while "it prescribes no particular form, it does by its terms require "that, in the case of development after the appointed day, the "enforcement notice must bring home to the person on whom "it is served, first, whether the authority objects to development "without permission or to failure to comply with conditions, and "secondly, if the objection is to development, that the development is alleged to be without permission. No particular formula "is prescribed and the notice could satisfy this last condition "either by an express statement to the effect that the development "was without permission or by a reference to section 23 (2) which "necessarily connotes an allegation that the development was "without permission."

Lord Evershed said [7]: "The notice must also draw specific "attention to the grounds of complaint: that is, it must allege "as regards any buildings or other matters of complaint either "that they constitute development for which no permission has "been granted, or (as the case may be) that they constitute or "have involved non-compliance with conditions imposed when "the permission was given." Later the learned Lord takes up the same point again and says [8]: "I have already expressed my "view that a notice related to alleged contravention of 1947 Act "control must in order to satisfy the requirements of form "according to section 23 (2) not only indicate the buildings or "other matters complained of but must also make it sufficiently "clear upon which of the two grounds indicated in subsection (1) "they are objected to."

I think that makes it quite plain that all that is required when Lord Evershed says it is necessary to state the grounds, he is saying in terms, that you have got to state whether the allegation is that the development has taken place without permission, or whether the allegation is that the development has taken place in breach of condition, and if the notice does adequately make plain which of those two grounds are relied upon, and also identifies the act which is alleged to constitute the breach, that is sufficient, and the notice does not have to state the reasons why the act specified does involve a breach. Accordingly, on the first point taken, my judgment is that the notice could not be attacked.

Secondly, it is said that this notice is invalid because, in effect, the local authority are by this notice seeking a wrong remedy.

---

[7] [1957] A.C. 223, 248.

[8] Ibid. 249.

They are saying by the recitals in the notice that this is a case where development has taken place without the grant of planning permission, whereas upon the admitted facts it is plain that the permission was granted by the Minister on appeal from the local authority, albeit that permission was subject to the condition that the use should not continue after six months. This enforcement notice gives the go by entirely to the application made by the plaintiff to the authority, and to the refusal by the authority, and the ultimate decision on the appeal by the Minister. It treats the matter as if those events had never taken place at all and that there had been merely a development without the grant of planning permission. But when once it is established, as it is here, that in fact a planning permission was given by the Minister, albeit only for six months, then it is shown that the whole basis of the enforcement notice is falsified because the basis of this notice is that the development has been carried out without the grant of planning permission required under Part III of the Act.

It seems to me, on the proper construction of the sections of the Act, which I need not set out in my judgment, that when once a local authority, or on appeal the Minister, has given permission for a particular development, even though that permission is limited by a condition that the use shall be discontinued after a limited time, that development can no longer be considered development which has been carried out without the grant of planning permission.

Mr. Widgery, however, as I understood his argument, submitted that as soon as the plaintiff continued to carry on the use, after the expiry of the six months permitted by the Minister, the local authority then were given a choice. They could either disregard the Minister's permission altogether and treat this as a case of development without any planning permission, or they could treat it as a case where there was a breach of that condition in the planning permission, namely, a continuance in the use after the period of permission had expired, and what the local authority in dealing with this case did was to elect to make use of the first choice.

In my judgment, however, as I have already stated, once permission has been given, albeit subject to conditions, it can no longer be said that that use carried out under that permission can constitute development without permission under the Act, because it has now become a permitted development although subject to a condition.

Accordingly, as this notice, although sufficiently specifying the development complained of as required by section 23 (2), does not truly state that that development was carried out without the grant of planning permission, it seems to me, subject only to the last point taken by Mr. Widgery, that that enforcement notice must be declared invalid because it lacks any true factual basis.

I accordingly now turn to the final submission which is formulated in paragraph 9 of the defence in these words: "Alternatively as the plaintiff did not appeal against the enforcement notice in the court of summary jurisdiction pursuant to "section 23 (4) of the Town and Country Planning Act, 1947, the "defence will rely on section 24 of that Act." The argument is based on the terms of section 23, and, more particularly, section 24 that, inasmuch as under section 23 (4) the plaintiff, when served with this notice had a right to appeal to a court of summary jurisdiction, and had an opportunity before that court of alleging and proving that permission had been granted, whereupon the court would have quashed the order, he in fact did not do so, with the result, it was said, that the matter then fell to be dealt with under section 24 (3) of the Act by way of prosecution by the local authority for use of the land, which by virtue of the enforcement notice is required to be discontinued. It is said that on such a prosecution it would not have been open to the plaintiff to take the point now taken that the enforcement notice was invalid, on which it is argued that that being the remedy provided for by the statute, this court in the exercise of a discretionary remedy by way of declaration could not assist the plaintiff.

Argument on this branch of the case was based on *Perrins* v. *Perrins*,[9] and the passages in the judgment of Lord Goddard C.J. giving the leading judgment in the Divisional Court where, as in the hypothesis stated, the owner took no steps to challenge the enforcement notice, but waited until he was prosecuted under section 24 before taking the point, and it was held that it was then too late for him to take the point. Lord Goddard C.J. said[10]: "Whether the corporation were right or wrong in the "view which they took here, it seems to me that the Act provides "that if a planning authority choose to serve an enforcement "notice, and that notice is not challenged within 28 days, it "becomes effective, and there is the end of the matter." But, when it is borne in mind that the court in that case was dealing only with the question whether a court of summary jurisdiction were right or wrong in refusing to convict, that judgment must be read subject to the limitation that it was only dealing with defences open to the owner in the court of summary jurisdiction. That seems to me to be quite a different question from that which is posed to me here. It is a fundamental rule that if a subject is to be deprived of a right of coming to these courts it must be in clear words. The indications in this statute are to the contrary effect.

---

[9] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[10] [1951] 2 K.B. 414, 418.

Contrast is drawn between a case in section 24 (1) and in section 24 (3). Section 24 (1) deals with the case of a local planning authority taking steps pursuant to an enforcement notice other than an enforcement notice requiring the discontinuance of any use of land, and provides that if they do take such steps the local planning authority can recover the cost of a simple contract debt in any court of competent jurisdiction, and if the owner failed to appeal to the court of summary jurisdiction he shall not be entitled in proceedings under that subsection, that is, before any court of competent jurisdiction, to dispute the validity of the action taken by the local authority upon any ground which could have been raised by such an appeal. There is the very precise exclusion of the subjects' ordinary rights, but it is limited to that one case where the local authority are suing to recover the cost of steps taken pursuant to that form of enforcement notice.

When one comes to section 24 (3) there is no such provision, and in my judgment there is no reason why one should read into that section what is contended for by the defendants, namely, that if the owner does not exercise a right of appeal under section 23 (4) within the 28 days he is thereby precluded from raising in any court the points against the enforcement notice.

In my judgment, therefore, inasmuch as the enforcement notice is based upon a fundamentally false basis of fact, it is right that that notice is invalid, and I declare accordingly.

Judgment for the plaintiff.

Solicitors: *Speechly, Mumford & Craig for Woodbridge & Sons, Uxbridge; Sharpe, Pritchard & Co. for A. Boote, West Drayton.*

J. D. P.

KHAN *v.* AHMED.

[1956 K. No. 269.]

1957
May 6, 7.

Lynskey J. and a jury.

Libel and Slander—Libel—Newspaper—Qualified privilege—Request for apology—Form—"Public meeting"—Restricted admission—Members of students' federation and guests only—Defamation Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 66), *s.* 7, *Sch., Pt. II, para.* 9.

On January 10, 1955, there was published in a Pakistani newspaper a report, written by the defendant, of a meeting of the Pakistani Students' Federation held in London to celebrate the birthday anniversary of a national leader. On January 17, 1955, solicitors for the plaintiff, a member of the Federation who had attended the meeting, wrote to the defendant a letter which, after complaining of the article and alleging that it referred to the plaintiff and would involve him in serious repercussions, stated: "In our "opinion your article constitutes a most serious libel on our client "and he therefore requires that you should arrange to be published "forthwith a full apology . . . such apology to be framed in a "manner satisfactory to our client. In the absence of such apology "our client will take such steps as he may be advised to protect "his interests." No apology or explanation or contradiction was published in the newspaper and in an action by the plaintiff claiming damages for libel contained in the report the defendant pleaded, inter alia, that the publication of the report was privileged under section 7 of the Defamation Act, 1952:—

Held, (1) that the meeting of the Pakistani Students' Federation was a "public meeting" within the definition in paragraph 9 of Part II of the Schedule to the Defamation Act, 1952, and the defendant's report was, therefore, one to which section 7 (1) applied.

(2) That section 7 (2) contemplated a special request that there should be published either a contradiction or an explanation in the words of a letter or in terms put forward by the person alleging that he had been libelled and that a general letter asking for a full apology and withdrawal such as that written by the plaintiff's solicitors was not a request in accordance with the subsection. Accordingly, the defence of privilege provided by section 7 was open to the defendant.

JURY ACTION.

There was published in the issue for Monday, January 10, 1955, of "Dawn," a Pakistani newspaper with an English language edition and a small circulation in England, a report of a meeting of the Pakistani Students' Federation held in London on January 7, 1955, in honour of Quaid-I-Azam Mohammad Ali Jinnah, the Pakistani leader. On January 19, 1955, the solicitors then acting for the plaintiff, Yusuf Ali Khan, a member of the Federation who had attended the meeting, wrote the following letter to the defendant, Nasim Ahmed, the London correspondent of "Dawn" and the author of the report: "We have been consulted by Mr. "Y. A. Khan, of Gray's Inn, London, W.C.1, who has referred "us to an article purported to be written by you in the issue "of 'Dawn' for Monday, January 10, 1955. This article related "to the meeting organized by the Pakistani Students' Federation "in London which meeting was held on January 7 to celebrate "the birthday anniversary of the Quaid-I-Azam. The last paragraph of such article states: 'Some Communist rowdies tried "'to create disturbance at the close of the meeting but they "'were booed by members of the audience.' Our client tells us "that he was the only person who spoke from the body of the "hall, that he was personally well known to you, and that he "was also well known to almost all of the audience and the guest "speakers. It is therefore apparent to anyone who was at the "meeting in question that your reference to 'Communist "'rowdies' must apply to our client. Our instructions are that "our client's interpolation from the body of the hall was perfectly "well conducted on a point of order and took place when the "President in closing his vote of thanks after the conclusion of "the celebrations referred to internal controversial matters of the "Federation. Our client informs us that he quite properly "pointed out to the President that this was a birthday celebration of the Quaid-I-Azam and this was hardly the occasion to "discuss such matters and if he wanted such a discussion a "general meeting of the students would be the proper forum.

"As you are personally well aware our client, who was the late "treasurer of the Federation, is neither rowdy nor a Communist "and your article (for the reasons we have indicated above) is "likely to involve our client in most serious repercussions, more "especially as he is a student of the Bar and shortly he hopes "that he will qualify and return to Pakistan to practise. It will "readily be appreciated how serious your uncalled for allegations "might be on reference to the Urdu language Daily Nawa-i-"waqt of January 14, 1955, where the editorial leader on page 3 "refers to your article under the heading 'These ungrateful "'Pakistanis' and goes on to suggest that the Pakistan Government should review their policy of issuing passports, etc., and "asks 'who are these Pakistani students who are Communists "'and how have they reached London?—such a fact is bitter "'and shameful.'

"In our opinion your article constitutes a most serious libel "on our client and he therefore requires that you should arrange "to be published forthwith a full apology for your completely "unfounded report (which report you knew well to be untrue) "such apology to be framed in a manner satisfactory to our "client.

"In the absence of such apology our client will take such "steps as he may be advised to protect his interests."

No action was taken by the defendant to secure the publication in "Dawn" of any apology or retraction and in fact none was published and the plaintiff issued a writ against the defendant claiming damages for libel in respect of the article. The defendant denied the plaintiff's allegations and pleaded, inter alia, that the publication of the report of the meeting was privileged pursuant to section 7 (1) of the Defamation Act, 1952.[1] The plaintiff, in reply, pleaded that the defendant had been requested by him to publish in the newspaper "Dawn" a reasonable letter or statement by way of explanation or contradiction and had refused or neglected to do so, which request was contained in the letter dated January 19, 1955, from his solicitors to the defendant.

This report is confined to the issue, argued in the absence of the jury, raised by the defendant's plea of privilege.

Richard Vick for the defendant. The defendant's report in the newspaper "Dawn" was a fair and accurate report of the proceedings of a public meeting held in the United Kingdom within paragraph 9 of Part II of the Schedule to the Defamation Act, 1952, and as such its publication was privileged under section 7. The letter of January 19, 1955, written on behalf of the plaintiff was the kind of letter which might have been written before the Act of 1952 came into operation, and is not a request for an explanation or contradiction within section 7 (2). That subsection contemplates a request so framed that what is asked for is a reasonable explanation or contradiction, not an aggressive threatening letter such as this. The provisions of section 7 (2), therefore, do not avail the plaintiff.

---

[1] Defamation Act, 1952, s. 7: "(1) Subject to the provisions of this "section, the publication in a news-"paper of any such report or other "matter as is mentioned in the "schedule to this Act shall be privi-"leged unless the publication is "proved to be made with malice. "(2) In an action for libel in respect "of the publication of any such report "or matter as is mentioned in Part 2 "of the Schedule to this Act, the "provisions of this section shall not "be a defence if it is proved that the "defendant has been requested by "the plaintiff to publish in the news-"paper in which the original publica-"tion was made a reasonable letter "or statement by way of explana-"tion or contradiction, and has "refused or neglected to do so, or "has done so in a manner not "adequate or not reasonable having "regard to all the circumstances."

Schedule: "Part II. *Statements* "*privileged subject to explanation or* "*contradiction*. . . . 9. A fair and "accurate report of the proceedings "at any public meeting held in the "United Kingdom, that is to say, a "meeting bona fide and lawfully held "for a lawful purpose and for the "furtherance or discussion of any "matter of public concern, whether "the admission to the meeting is "general or restricted."

John Stonehouse for the plaintiff. A defendant is not entitled to plead privilege as a defence if he has been asked to explain and apologize and has not done so. Section 7 of the Act of 1952 is intended to give protection to a defendant in a case where the defamation was unintentional, as in *E. Hulton & Co.* v. *Jones*,[2] and although the language of the letter written on behalf of the plaintiff was strong it was justified in the circumstances. The letter asked the defendant to explain that the report did not refer to the plaintiff and to apologize, and it cannot be said that it does not amount to a request within section 7 (2). The defendant published no explanation or apology and therefore cannot plead privilege under section 7.

[LYNSKEY J. The privilege under section 7 only extends to a fair and accurate report; if the report is fair and accurate there is no right to call for an apology, only for an explanation or contradiction.]

In any event the meeting of the Pakistani Students' Federation was open only to members and the guests and was not a public meeting within paragraph 9 of the Schedule to the Act, so that by section 7 (2) the privilege provided for by section 7 (1) does not apply to the publication of the defendant's report. While the words " general or restricted " in relation to admission in paragraph 9 may be apt to include a meeting where admission is restricted by payment, it is submitted that they do not include a meeting where admission is limited by a personal qualification such as membership. [Reference was made to Gatley on Libel and Slander, 4th ed. (1953), p. 327.]

LYNSKEY J., during the course of the summing up to the jury, gave the following ruling: The defendant has pleaded the statutory defence of privilege under the Defamation Act, 1952.

Section 7 of that Act (and this was not always the law) provides that: " (1) Subject to the provisions of this section, the " publication in a newspaper of any such report or other matter " as is mentioned in the schedule to this Act shall be privileged " unless the publication is proved to be made with malice."

---

[2] [1910] A.C. 20; 26 T.L.R. 128.

There is no evidence at all of any malice on the part of the defendant, nor is any suggestion of malice made by the plaintiff, so that, if the matter is privileged by section 7, then that privilege holds.

What is privileged is, by paragraph 9 of the Schedule to the Act, " A fair and accurate report of the proceedings of any public " meeting held in the United Kingdom, that is to say, a meeting " bona fide and lawfully held for a lawful purpose and for the " furtherance or discussion of any matter of public concern, " whether the admission to the meeting is general or restricted."

It was argued before me in your absence that this was not a " public meeting," and it may not have been a " public meeting " as understood before the passing of this Act. But this Act defines what a public meeting is: " . . . a meeting bona fide and " lawfully held for a lawful purpose and for the furtherance or " discussion of any matter of public concern, whether the admission to the meeting is general or restricted." Members of the jury, as a matter of law I rule and direct you that this was a public meeting. It was a meeting held for a lawful purpose, and it was held for the purpose of the furtherance or discussion of a matter of public concern, and, in those circumstances, privilege applies unless by section 7 (2) it is proved that " the " defendant has been requested by the plaintiff to publish in the " newspaper . . . a reasonable letter or statement by way of " explanation or contradiction, and has refused or neglected to " do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances."

That, again, is a matter of law. One letter, dated January 19, 1955, which has already been read to you, was written by the plaintiff's solicitor. It was a letter demanding a full apology and withdrawal of the publication. Again, as a matter of law, I must direct you that that is not a " request " within the meaning of section 7 (2) because what is there referred to is a " special " request " that there should be published either a contradiction or an explanation in the words of the letter or in terms put forward by the person alleging that he has been libelled, and in this case that was not done. All that was done was to write a general letter asking for a full apology, and I rule that that was not a compliance with the section.

The result is that the publication is privileged if you think that it was a fair and accurate report of the proceedings at the meeting, and this is one of the questions you will have to decide if you think that a reasonable person would identify the plaintiff with the alleged libel.

On the issues left to them, the jury returned a verdict for the defendant.

Judgment for the defendant.

Solicitors: *Cree, Godfrey & Wood; Murray Napier & Co.*

J. F. L.

C. A.
1956
Dec. 3, 4.

Lord Goddard C.J., Morris L.J. and Vaisey J.

RECEIVER FOR THE METROPOLITAN POLICE DISTRICT *v.* CROYDON CORPORATION AND ANOTHER.

MONMOUTHSHIRE COUNTY COUNCIL *v.* SMITH.

Police—Wages—Wages during incapacity—Recovery—Injury to constable through negligence of defendants—Wages during incapacity paid by police authority—Right of recovery by police authority from defendants of money paid—Power of police authority to sue defendants for money paid.

Restitution—Unjust enrichment.

Two police constables in the employ of different police authorities were injured while on duty by the negligence of the respective defendants and as a result of their injuries were incapacitated from performing their duties for several months. During that period of incapacity the respective police authorities, acting under statutory regulations, paid the constables their full wages and allowances. An action brought by one constable claiming damages for his injuries was settled on the payment by the appropriate defendants of a sum of money; the other constable was successful in the prosecution of his action for damages against the defendant responsible for his injuries. In both actions the constables made no claim for loss of wages. The police authorities, basing their claims on unjust benefit, sued the appropriate defendants for the amounts of wages and allowances paid to the constables during the period of their incapacity:—

Held, that the constables, having been paid their wages, had suffered no loss in respect thereof for which the defendants could be made liable in damages. The defendants had paid to the constables by way of damages all that they were in law liable to pay, and could not be said to have derived unjust benefit by reason of the police authorities' payments. There was therefore no obligation on the defendants to pay the police authorities—who had not been called upon to pay anything which they would not otherwise have had to pay—the wage payments which they had made.

Per Lord Goddard C.J. The only loss sustained by the police authorities was the loss of the constables' services and the recovery

C. A.
1956

RECEIVER FOR THE METROPOLITAN POLICE DISTRICT
v.
CROYDON CORPORATION.

MONMOUTHSHIRE COUNTY COUNCIL
v.
SMITH.

whereby he has lost the benefit of his services

of that loss by an action per quod servitium amisit was not open to them because a police constable was not the servant of the police authority.

Attorney-General for New South Wales v. *Perpetual Trustee Co. Ltd.* [1955] A.C. 457; [1955] 1 All E.R. 846 applied.

Brook's Wharf and Bull Wharf Ltd. v. *Goodman Brothers* [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696 considered.

Decision of Slade J. [1956] 1 W.L.R. 1113 reversed.

Decision of Lynskey J. [1956] 1 W.L.R. 1132 affirmed.

APPEAL from Slade J.[1] [*Receiver for the Metropolitan Police District* v. *Croydon Corporation and Another*].

On January 25, 1952, John Edward Bowman, a police constable in the metropolitan police, was injured while directing traffic by a motor-lorry owned by the first defendants, Croydon Corporation, and driven by the Corporation's servant, Jesse William Holloway, the second defendant. As a result of the accident, Bowman was incapacitated from carrying out his duties as a police constable for a period of seven months. Bowman brought an action in the Queen's Bench Division against both defendants claiming damages for their alleged negligence, and that action was settled on the payment of a sum of money to Bowman.

The Receiver for the Metropolitan Police District, the present plaintiff, sued the defendants for £104, money paid to Bowman during his period of incapacity. The receiver alleged that he was compelled to and had paid to Bowman £153 13s. 6d. pay and allowances during the period Bowman was off duty and that by reason of their negligence the defendants were liable in damages and had benefited to the extent of £104, part of the sum paid by the receiver, and their obligation to Bowman had been reduced pro tanto. The defendants denied that the sum claimed was recoverable.

The following facts were agreed: (1) At all material times Bowman was a constable in the metropolitan police. (2) The defendants paid £2,513 12s. 6d. in full satisfaction of Bowman's claim in his action against them. (3) Bowman made no claim for loss of wages in that action: had he been entitled to include and recover in that action his loss of wages as an item of special damage he would have recovered £2,513 12s. 6d. plus £104. (4) Bowman was incapacitated from carrying out his duties as a police constable for a period of seven months as a result of injuries caused to him by the defendants' negligence. (5) During that period of incapacity the receiver had paid Bowman his full wages and allowances as a police constable. (6) The net sum so paid by the receiver was £153 13s. 6d. (7) The defendants admitted the allegations of negligence in the present action.

---

[1] [1956] 1 W.L.R. 1113.

Slade J. held that the defendants had obtained the benefit of the receiver's payment of £104 in the discharge of their liability to the police constable and were indebted to the receiver for the same amount. The defendants appealed.

APPEAL from Lynskey J.[2] [*Monmouthshire County Council* v. *Smith*].

On November 7, 1952, Frank William Nash, a police constable serving in the Monmouthshire constabulary, was injured while directing traffic by a motor-car negligently driven by the defendant, Eric George Smith. As a result of the injuries Nash went on sick leave for 35 weeks, then on light duty for 71 weeks, but had to be compulsorily retired thereafter. During the periods of sick leave and light duty the plaintiffs, Monmouthshire County Council, paid him full wages and allowances, and after his retirement they paid him a pension which they were by statute compelled to do.

On February 16, 1956, Nash recovered damages from the defendant in an action for negligence. He did not, in that action, claim in respect of loss of wages while on sick leave and light duty; but his pension was taken into account in assessing the damages for the period after his retirement. The plaintiffs now claimed to be reimbursed a sum totalling £751 18s., which included the full pay and allowances paid by them to Nash during his period off duty; half the full pay and allowances paid to Nash while he was on light duty, and amounts of pension paid from the date of retirement down to the date of his action against the defendant.

The plaintiffs claimed that these sums had been paid to or on behalf of Nash and were sums which the defendant was liable to pay.

Lynskey J. held that as none of the sums in question could have been recovered by Nash in his action against the defendant, the constable having suffered no loss in respect thereof, there was no obligation on the part of the defendant to pay the county council the amount they had paid Nash and which they were obliged by statute to pay. The plaintiffs appealed.

---

[2] [1956] 1 W.L.R. 1132.

The two appeals were set down to be heard consecutively but Mr. Gardiner, for the plaintiff in the first appeal, intimated that if he failed in the first appeal he could not argue the second appeal.

Gilbert Paull Q.C., *Montague Berryman Q.C.* and *Humfrey Edmunds* for the defendants in the first appeal. The question is whether the authority, who by statute is under a duty to pay the wages of a police constable, can recover from a person who by negligence injures the constable, wages paid to the constable during the period of his incapacity. The receiver is obliged by statute to pay a police constable incapacitated by illness or accident his full wages during his incapacity. The judgment of Slade J. is based on a wrong foundation in that he allowed the plaintiff's claim on the basis of quasi-contract. The words of Earl Jowitt in *British Transport Commission* v. *Gourley* [3] show that the defendants have received no benefit nor have they been in any way unjustly enriched, for they have paid to the police constable all the damages for which they were liable.

A police constable is in the service of the Crown; it is, therefore, the Crown who suffers the loss of services of the injured police constable, not the receiver: see *Attorney General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[4] and *Inland Revenue Commissioners* v. *Hambrook.*[5] Those cases show that the action per quod servitium amisit does not lie at the suit of the Crown for the loss of the policeman's services.

The plaintiff is seeking to recover on the basis of quasi-contract, but for an action for money paid to lie the following conditions must be fulfilled: (1) There must be a liability on A and B to pay the same money to C. (2) As between A and B, B must be primarily liable. (3) A must pay C by compulsion of law. (4) A can then recover what he has paid to C from B. In the present case, however, B as the tortfeasor was never liable to pay C's wages, so the conditions to found an action on quasi-contract do not exist. The defendants rely entirely on the judgment of Lynskey J. in *Monmouthshire County Council* v. *Smith.*[6]

Another method of approach is this: in an action where there is a tort involved, one must determine the area of a tortfeasor's duty. If the loss comes within that area of duty there is a liability on the tortfeasor for loss occasioned by his negligence. But if the loss is outside the area of his liability, the tortfeasor is not responsible and cannot be sued in respect of the consequences of his negligence. This claim by the plaintiff is an attempt to enlarge the area of a tortfeasor's responsibility.

---

[3] [1956] A.C. 185, 202.

[4] (1952) 92 C.L.R. 113; [1955] A.C. 457; [1955] 1 All E.R. 846.

[5] [1956] 2 Q.B. 641; [1956] 3 All E.R. 338.

[6] [1956] 1 W.L.R. 1132.

Gerald Gardiner Q.C. and *Patrick O'Connor* for the plaintiff. This is not an action in tort but an action of unjust benefit. The question is: who is ultimately liable in law to maintain the injured police constable during his period of incapacity? The plaintiff contends that the lorry driver who caused the injury is liable. With limited exceptions a cause of action must fall under one of three heads: contract, tort, or unjust enrichment. For the last 25 years there have been cases neither in contract nor tort where the courts have implied a liability, not referable to any other head of liability, on the defendant to pay a sum of money to the plaintiff where, if he did not do so, the defendant would receive an unjust benefit. In continental law this is called unjust enrichment; in United States law it is called restitution, but whatever it is called, unjust benefit forms part of every civilized system of law. Quasi-contract is part of the law of unjust benefit. It may be the name, quasi-contract, that has caused the difficulty here because of the question whether it depends on an implied contract. In all cases of quasi-contract lip service is paid to what is called an implied contract, but the words "implied contract" are wrong. An implied contract now means a real contract which is implied from the conduct of the parties. In the old days it was a fiction imposed by the court.

Lynskey J. was wrong in saying that this case depended on *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Brothers.*[7] The old cases have this in common: they are not cases in contract or in tort, but are cases where the plaintiff has paid a sum of money for which he was not necessarily liable but which he had to pay from a practical point of view. In some of the cases the defendant was liable for the same amount as the plaintiff. The constant factors are these: the plaintiff, under what the law regards as compulsion, has paid a sum of money either to the defendant or a third party in circumstances in which the defendant would receive an unjust benefit if he did not repay or make good to the plaintiff the money which he, the plaintiff, has paid to the third party. The old cases accept the existence of a principle which is neither in contract nor tort, namely, that where the plaintiff has paid under compulsion of law some money to a third party or to the defendant which would afford an unjust benefit to the defendant if he did not make that sum good to the plaintiff, the plaintiff is entitled to recover it: see *Dawson* v. *Linton*[8]; *Hall* v. *Hollander*[9]; *Pownal* v. *Ferrand*[10]; *Tugwell* v. *Heyman*[11]; *Rogers* v. *Price*[12]; *Gebhardt* v. *Saunders*,[13] and *Moule* v. *Garrett*.[14] The principle underlying all these cases is that the liability should ultimately rest on the wrongdoer. The actions lay neither in contract nor in tort. In *Rogers* v. *Price*[15] there was no liability on the plaintiff to order the funeral, but it was properly treated as something done by him under compulsion, because from a practical point of view corpses cannot be left on the surface of the earth. The basis of the liability there was that the plaintiff had paid under compulsion what was the debt of the executor, the defendant. Had the executor not been held ultimately liable he would have received an unjust benefit. The defendants in the present case are in the same position as the executor in that case. As to the nature of the obligation on the plaintiff to pay, see *In re Rhodes*,[16] *per* Cotton L.J.

---

[7] [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696.

The basis of the claim made here is neither in contract nor in tort, but is that money has been paid under compulsion and is properly repayable by the defendants, because if it were not they would receive an unjust benefit. The fact that the compulsion on the plaintiff to pay the money preceded the wrong done by the defendants should not operate to relieve the defendants. The principle for which the plaintiff contends is referred to by Vaughan Williams L.J. in *Moxham* v. *Grant*.[17]

In *Inland Revenue Commissioners* v. *Hambrook*[18] it was held that a per quod action lies only in respect of menial servants, but that does not affect the plaintiff here, because he has not lost any services. He does not employ the police and the loss of services has nothing whatever to do with his claim.

Gerald Gardiner Q.C. and *R. C. Hutton* for the plaintiffs in the second appeal.

R. G. Micklethwait Q.C. and *C. N. Pitchford* for the defendant.

---

[8] (1822) 5 B. & Ald. 521.
[9] (1825) 4 B. & C. 660.
[10] (1827) 6 B. & C. 439.
[11] (1812) 3 Camp. 298.
[12] (1829) 3 Y. & J. 28.
[13] [1892] 2 Q.B. 452.
[14] (1870) L.R. 5 Ex. 132; (1872) L.R. 7 Ex. 101.
[15] 3 Y. & J. 28.
[16] (1890) 44 Ch.D. 94.
[17] [1900] 1 Q.B. 88, 94; 16 T.L.R. 34.
[18] [1956] 2 Q.B. 641; [1956] 3 All E.R. 338.

C. A.

1956

RECEIVER FOR THE METROPOLITAN POLICE DISTRICT v. CROYDON CORPORATION.

MONMOUTHSHIRE COUNTY COUNCIL v. SMITH.

LORD GODDARD C.J. These two appeals raise exactly the same point. The first case is an action by the Receiver of Metropolitan Police against the Croydon Corporation and a servant of the Croydon Corporation, in which the receiver claims the amount of a policeman's wages paid during a time when he was off duty as the result of an accident which happened in the course of his duty. He was injured by a lorry, the property of the corporation, and driven by their servant. In the second case the Monmouthshire County Council are suing for money which was paid by them to a police constable in the Monmouthshire force under exactly the same circumstances. The defendant in that case was Eric George Smith. In the first case Slade J. held that the receiver was entitled to maintain his action; in the second case Lynskey J. came to the contrary decision. In the opinion of this court Lynskey J. was right; we do not agree with the decision of Slade J.

It is necessary to refer briefly to the position as to pay, allowances and so forth of police constables, and for the present purposes there is really no difference between the two cases. In London, the metropolitan police are under the direct control of the Home Secretary, but their wages are paid by the Receiver of Metropolitan Police, who, by the Metropolitan Police Act, is the person in charge of the fund, which is derived from various sources, such as the rates, an Exchequer grant, and so on, and out of this fund it is the receiver's duty to pay the wages of the police. The receiver claims in this action, as I understand it, that he, as the guardian of this fund, has a duty to claim, if he can, any sum which is properly payable to the fund. He contends that as the police constable in question was off duty for seven months, he, the receiver, is entitled to require the defendants to pay the wages he had to pay during that period of incapacity.

The Monmouthshire County Council come into the matter in this way. In a county, the police force is under the control of the standing joint committee, which arranges the payment of the wages of the police by requiring the county council to provide funds. The county council has to provide the funds which the committee requires. The Monmouthshire County Council, therefore, are basing their claim on exactly the same ground as the Receiver of Metropolitan Police.

The first thing to remember in this case is that under the statutes and the statutory regulations made thereunder by which the police forces, both in the metropolis and in the counties, are governed, it is accepted that the police authority is obliged to pay a constable his full wages and allowances, though he may be off duty by reason of an injury received in the course of his service. A time may come when the police officer has to retire because his injuries may have rendered him unfit to remain in the police force; and in that case he will receive a pension, but so long as he is in the police force, he is paid whether he is fit for duty or not, so long as the unfitness for duty is caused by an accident arising out of his duties as a policeman.

In the Croydon case, as in the Monmouthshire case, the police officer in question was injured while regulating traffic. In the Croydon case the injury kept him off his duties for something like seven months. He was paid full wages during that time, and received all the other emoluments to which he was entitled. Both police constables brought actions in which they made no claim for loss of wages as part of the damage which they had sustained, because they had not sustained a loss of wages. Their wages had been paid to them during incapacity, and, therefore, the damages which they recovered against the respective defendants were not so large as they would have been if they had been entitled to claim wages.

It is said that the respective defendants have received a benefit by reason of the fact that the receiver and the county council paid the wages during the period of incapacity, and that therefore they, the defendants, have not had to pay damages as great as they would otherwise have had to pay. For example, in the case of an ordinary man who was in receipt of a weekly wage, and who was injured, the negligent defendant would have had to pay as part of the special damage the wages which the injured man had lost.

Slade J. has treated the case as one which depends upon the doctrine of unjust enrichment. He has held that inasmuch as the defendants escaped paying these wages because of the payments made by the receiver, they have received a benefit and must now pay the receiver the amount of those wages. That seems to me to be a misconception, because I cannot see that the defendants have been in any way enriched. Indeed, the matter was dealt with by Earl Jowitt in his speech in *British Transport Commission* v. *Gourley* [1]: "It is, I think, if I may say so with the utmost "respect, fallacious to consider the problem as though a benefit "were being conferred upon a wrongdoer by allowing him to "abate the damages for which he would otherwise be liable.

---

[1] [1956] A.C. 185, 202; [1955] 3 All E.R. 796.

C. A.
1956

RECEIVER FOR THE METROPOLITAN POLICE DISTRICT v. CROYDON CORPORATION.

MONMOUTHSHIRE COUNTY COUNCIL v. SMITH.

Lord Goddard C.J.

"The problem is rather for what damages is he liable? and if we "apply the dominant rule, we should answer: 'He is liable for "'such damages as, by reason of his wrongdoing, the plaintiff "'has sustained.'" It will be remembered that in *Gourley's* case [2] the question was whether, in compensating a man for loss of earnings, one was to take into account his gross earnings or his net earnings after tax; the latter was held to be the right measure.

In both these cases, the constables sustained certain damage for which they have been compensated. That damage, as I say, did not include wages, because they had already been paid their wages. What is the result of that? The receiver in the one case, and the county council in the other case, have not been called upon to pay anything which they would not otherwise have had to pay. Their obligation is to pay police officers during the time when they are off duty through disablement, provided that the disablement arose in the course of their service. Therefore I cannot see that the receiver or the county council are any worse off than they would have been if these accidents had never taken place. It is their duty to pay a policeman so long as he is in their service.

Once that point is realized it follows that the only loss which the police authorities have sustained is that they have had to pay the police officers, although they were deprived of their services. That loss is exactly the loss which was recoverable, and in certain limited cases is still recoverable, in an action per quod servitium amisit. The old action of per quod was given to a master because he was deprived of the services of his servant. However, in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.*[3] it was held by the Judicial Committee that in the case of a police officer, a per quod action will not lie because the officer is not a servant of the police authority but of the Crown, for he may have to act independently of the police authority. This court, in *Inland Revenue Commissioners* v. *Hambrook*,[4] applied that judgment to the case of an injury to a civil servant, and expressed the view that a per quod action must nowadays be confined to the case of what is generally known as a menial servant. Therefore, it follows that police authorities are not entitled to claim now for loss of their police officers' services against the person who injures them.

---

[2] [1956] A.C. 185.

[3] [1955] A.C. 457; [1955] 1 All E.R. 846.

[4] [1956] 2 Q.B. 641; [1956] 3 All E.R. 338.

In order, therefore, to maintain this action, it must be shown that the legal liability rests on some other principle. The principle that is prayed in aid here is the principle that money which constitutes unjust enrichment of a person may be recovered in an action for money had and received, or money paid to the use of the person. In these cases both judges considered with great care the decision of this court in *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Brothers*.[5] That was a case in which a bonded warehouseman had taken into his warehouse furs which were imported, and which were liable to duty. A man keeps a bonded warehouse on terms that he will be responsible to the Customs and Excise authorities for dutiable goods which are deposited in his bonded warehouse before the duties have been paid. He is responsible to the Customs and Excise authorities if those goods go out of his bonded warehouse without having paid duty. In that case the defendants had imported skins, and put them in the bonded warehouse, not having paid duty. The goods were stolen, and therefore got out of the bonded warehouse. Thereupon the commissioners of customs claimed the amount of the duty against the bonded warehouseman, and recovered from him. He had no answer; he had held the bonded goods, which had left his warehouse, and he had to pay. He thereupon claimed, and was held entitled to recover from the importer, because it was the importer's primary duty to have paid the import duties as soon as the goods were imported into this country, and he only avoided having to pay that sum on importation by placing them in the bonded warehouse. Lord Wright M.R. likened the case to a case of principal and surety.

To my mind, that case, and the large number of cases which were cited there and have been cited in this case, have no bearing on the matter which we have to decide. The obligation of the defendants here was to compensate the injured men, and to pay them the damage which they had sustained. If a man's employer has agreed to pay him wages, whether he is well or whether he is ill, it seems to me that that affords a benefit in one sense to a defendant, because he does not have to pay the damage which he would have had to pay if that agreement had not been made. That simply means that he does not have to compensate the plaintiff for an injury which he has not suffered. The obligation is, in the words of Earl Jowitt, simply to pay

---

[5] [1937] 1 K.B. 534; 53 T.L.R. 126; [1936] 3 All E.R. 696.

C. A.
1956

RECEIVER FOR THE METROPOLITAN POLICE DISTRICT
v.
CROYDON CORPORATION.

MONMOUTHSHIRE COUNTY COUNCIL
v.
SMITH.

Lord Goddard C.J.

"such damages as, by reason of his [the defendant's] wrong-"doing, the plaintiff has sustained."[6] Having paid that, his obligation seems to me to be at an end.

No doubt if the action per quod had not been held inapplicable to policemen, the police authority would have been able to recover damages from the wrongdoer on the ground that he had deprived the authority of the services of the servant. That, however, is the only claim, it seems to me, once this matter is analysed, that the police authority can possibly put forward; their claim is simply for the loss of services. Their financial position has not been altered by a sixpence. Their duty is to pay wages whether the policeman is on duty or not, so long as his absence from duty is caused by an injury received in the course of his duty.

For these reasons, I think that the judgment of Lynskey J. was perfectly right when he held that there was no obligation on the part of the defendant to pay the police authority the amount of the wages which the police authority had paid, and I do not think that the cases which have been cited to us, and which were before the judges, need be reviewed.

My opinion is that the actions of the receiver and of the Monmouthshire County Council fail. I would therefore allow the appeal in the first case and dismiss it in the second. I should add that the only difference that I know of between the receiver's case and that of the Monmouthshire County Council is that in the latter case there is the question of the pension which was paid to the police officer. Mr. Gardiner does not seek to found any argument now on that fact. As we were against him in the first case he agrees that he cannot distinguish the Monmouthshire County Council case in any way. Indeed, as Lynskey J. thought, the pension seems to me to be an a fortiori case.

MORRIS L.J. I find myself in entire agreement with the judgment delivered by Lynskey J. and with the judgment which my Lord has delivered.

The first action arose out of an accident which occurred to a police constable named Bowman. When he was injured he sued the wrongdoers, but he did not include any claim for loss of wages because he had not lost any wages. At the moment when an accident happens, the wrongdoer does not know, in the nature of things, the extent of his liability. The days are gone when the owner of a carriage, seeing that the horses are becoming fractious and are likely to bolt, can exhort his groom to run into something cheap. Today the wrongdoer does not know at the moment of the accident whether he is going to incur a large or a small liability. If he knocks down a professional man earning a large income by his own personal endeavours, the liability for loss of earnings as an item of special damage may be very high. If he knocks down somebody earning a very low wage, this liability may be low. If he knocks down somebody of independent means the liability for loss of earnings may be nothing. If he knocks down somebody who is going to be paid wages whether he is at work or not, then it seems to me that there is no liability for that item of damage.

---

[6] [1956] A.C. 185, 202.

The matter was stated by Lord Goddard C.J. in *British Transport Commission* v. *Gourley*,[7] where he said this: "In an action "for personal injuries the damages are always divided into two "main parts. First, there is what is referred to as special "damage, which has to be specially pleaded and proved. This "consists of out-of-pocket expenses and loss of earnings incurred "down to the date of trial, and is generally capable of "substantially exact calculation. Secondly, there is general "damage which the law implies and is not specially pleaded. "This includes compensation for pain and suffering and the like, "and, if the injuries suffered are such as to lead to continuing or "permanent disability, compensation for loss of earning power "in the future. The basic principle so far as loss of earnings and "out-of-pocket expenses are concerned is that the injured person "should be placed in the same financial position, so far as can "be done by an award of money, as he would have been had the "accident not happened."

That, if I may say so, is in accord with the statement of Earl Jowitt in his speech in the same case[8]: "'He is liable for "'such damages as, by reason of his wrongdoing, the plaintiff "'has sustained.'"

In the Croydon case the position was that the policeman, who was a servant of the Crown, was one who, though totally incapacitated as a result of an injury received in an accident, was still entitled to his full pay and allowances so long as he remained a member of the force, and until he resigned or was compulsorily retired. So it seems to me that in the action brought by the policeman, the defendants were adjudged to pay all that they were liable to pay. If the facts had been different and if the policeman had actually suffered a loss of wages, then the defendants would have had to pay more. How, then, is the claim put in the action? The way in which it is pleaded in paragraph 4 of the amended statement of claim is as follows: "The said Bowman sustained serious personal injuries and was "incapacitated from performing his duties as a police constable "from the date of accident January 25 to June 9, 1952, and "from September 29 to October 28, 1952. The plaintiff was "compelled to and did pay to the said Bowman the sum of "£153 13s. 6d. pay and allowances in respect of the said periods "of incapacity. By reason of the matters set out in paragraphs "2 and 3 hereof the defendants were liable to the said Bowman "in damages [that is because of the negligence] and have "benefited to the extent of the sum of £104 part of the said "sum of £153 13s. 6d. paid by the plaintiff and their obligation "to the said Bowman has been reduced pro tanto. In the "premises the plaintiff is entitled to recover the said sum of "£104 from the defendants."

---

[7] [1956] A.C. 185, 206.

[8] [1956] A.C. 185, 202.

That is the way in which the case is stated, and that is the basis of the argument that Mr. Gardiner has addressed to us. It is said that the defendants have benefited. It seems to me that the answer to that is that they have not benefited. It is said that their obligation to Bowman was reduced pro tanto; again it seems to me the answer to that is that their obligation has not been reduced at all. Their obligation was to pay what Bowman lost, and they have been adjudged to pay what they were liable to pay. It seems to me, therefore, that the real position in this case is that what has been lost, probably not by the plaintiff but by someone else, is the benefit of the services that the police officer Bowman would have rendered during the time when he was incapacitated. It can be said with some force that the wrongdoer has been fortunate in that he has injured someone who must be paid whether he is injured or not, whereas those entitled to his services are during the period of incapacity denied those services. It might be said that a case could be put forward for consideration as to whether there might be some change in the law in regard to this matter so as to permit of the recovery of wages payable and paid in reference to a period of incapacity caused by a wrongdoer. But it does not seem to me that the defendants have in this case benefited or received an advantage.

The claim is put partly in reliance upon the principles referred to in the *Brook's Wharf* case.[9] In his judgment in that case Lord Wright M.R. said this[10]: "The essence of the rule is that "there is a liability for the same debt resting on the plaintiff and "the defendant and the plaintiff has been legally compelled to

---

[9] [1937] 1 K.B. 534.

[10] Ibid. 544.

"pay, but the defendant gets the benefit of the payment, "because his debt is discharged either entirely or pro tanto, "whereas the defendant is primarily liable to pay as between "himself and the plaintiff." I agree, if I may say so, with Mr. Gardiner that it is never wise to take a passage out of a judgment, and to treat it as though it were a statutory enactment. Lord Wright is there merely stating the essence of the rule. But it does not seem to me that the plaintiff brings himself within that rule, because there was no liability on the defendants for the wages, for the reason that the policeman did not lose them.

Reference was made to *Moule* v. *Garrett*.[11] In that case the plaintiff was a lessee, and the defendant was a sub-assignee who was in possession; he failed to comply with a covenant to repair. The lessee was made liable; he met the demand of the lessor for damages for breach of the covenant to repair. The lessee then sued the sub-assignee; there was no privity of contract between them, but they were both liable to the lessor. The plaintiff was held entitled to recover, and amongst the reasons was that given by Channell B., who said that the lessee was really in the position of a surety vis-a-vis the assignee. So in the *Brook's Wharf* case[12] both the importer and the warehouseman were liable for the payment of the customs dues, the importer as between the two of them being primarily liable.

But Mr. Gardiner, in inviting us not to take the words of Lord Wright as being an all-inclusive statement of the legal principle, invites us to say that the law is adaptable, and that within its framework can be found a principle which entitles him to recover in this case. He has adopted as part of his argument a statement from Sir Percy Winfield's book on The Law of Quasi-contracts, 1st ed. (1952), p. 63. The passage reads: "In spite "of our endeavour to extract from the decided cases some broad "general principle underlying the law as to compulsion in quasi-"contract, the utmost we can do is to enlarge our conclusion "that, where A, under what the law regards as compulsion, has "paid money to B or to C in such circumstances that the law "considers that its retention by B (where the payment was to "B), or B's failure to recoup A (where the payment was to C) "would constitute an unjust benefit to B at the expense of A, "A can recover the amount of payment from B." Again it does not seem to me that Mr. Gardiner can bring himself within any such principle, for the whole basis of it is that there must be some unjust benefit. I cannot see that there was any unjust benefit here received by the defendants when they have been held liable for all that they were in law liable to pay.

---

[11] (1870) L.R. 5 Ex. 132; (1872) L.R. 7 Ex. 101.

[12] [1937] 1 K.B. 534.

Mr. Gardiner referred us to a number of cases in which he submitted that a basis of liability was that there had been the receipt of a benefit. He submitted that in the present case the defendants had received a benefit or advantage which it is unconscionable for them to retain, and he said that a benefit may or may not consist of a sum of money. I do not propose to refer to all the cases which were cited by Mr. Gardiner for it does not seem to me that they carry him in this case. Some of them were cases in which there were claims for funeral expenses brought against executors; another was a case in which it was held that there could be implied an obligation on the part of a lunatic to re-pay money necessarily spent on her. I very much doubt whether those cases, when analysed, really depend upon an application of any doctrine of receiving a benefit, but whether they do or not it seems to me that Mr. Gardiner's submission here fails for the reason that it is not shown that the defendants received a benefit.

He referred us to *Gebhardt* v. *Saunders*,[13] where the plaintiff was tenant from year to year of the defendants of a house in London in which a nuisance arose because water and sewage collected in the cellars. A notice was served at the premises, directed to the owner or occupier, requiring the nuisance to be abated. No notice was served under a section which provides for the service on the owner of a notice to abate in cases where the nuisance arose from a defect of a structural character. The plaintiff did the work, and while the work was being done it was found that the nuisance did in fact arise from a structural defect in the drains. It was held that the plaintiff was entitled under a section of the Act to recover from the defendants the costs and expenses incurred in abating the nuisance as money paid by him for the use and at the request of the defendants. Charles J., in the course of his judgment, said[14]: "In my opinion the "ordinary principle of law is applicable to this case apart from "the statute, the principle applicable to cases where one man "has been legally compelled to expend money on what another "man ought to have done, and, without having recourse to "section 11, the plaintiff is entitled to recover from the defen-"dants as having been legally compelled to incur expense in "abating a nuisance which the defendants themselves ought to

---

[13] [1892] 2 Q.B. 452.

[14] Ibid. 458.

"have abated." Mr. Gardiner cited that as one illustration of the cases that he referred to as the nuisance cases. But again, it does not seem to me that they carry Mr. Gardiner, and for the same reason, that it is not shown that the defendants in this case received a benefit. If an employer makes a contract for a fixed period with a servant, and agrees to pay him a fixed sum, possibly in advance, whether the servant is ill or well, fit or unfit, and if the servant is injured by a wrongdoer and is away for a week, the servant has not then suffered any loss of pay, and the wrongdoer cannot be liable for what the servant has not lost.

For these reasons it seems to me that Mr. Gardiner does not bring himself within the principle upon which he relies.

VAISEY J. Whether the law on the point arising in these two appeals is altogether satisfactory I am not sure and express no opinion, but on the law as it stands, I feel no doubt at all that the appeal from the judgment of Slade J. succeeds, and the appeal from the judgment of Lynskey J. fails. I respectfully agree with the last-mentioned judgment and with all that has fallen from my Lords, and I have nothing to add of my own.

First appeal allowed.
Second appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Ponsford & Devenish, Tivendale & Munday; Herbert Smith & Co.; Vernon Lawrence, Newport, Mon.; Rhys Roberts & Co. for Myer, Cohen & Co., Cardiff.*

P. P.

ATTORNEY-GENERAL *v.* P. Y. A. QUARRIES LTD.

[1952 A. No. 667.]

C. A.
1957
Jan. 30, 31;
Feb. 1, 6, 7, 8, 11;
Mar. 15.

Denning, Romer and Parker L.JJ.

Nuisance—Public—Class of public affected—Whether sufficient number —Question of fact or law—Quarry—Projection of stones by blasting—Dust and vibration—Injunction—"Public nuisance"—Distinction from private nuisance—Injunction.
Fact or law.

In an action in which the Attorney-General, on the relation of the county council and the local rural district council, alleged that

C. A.

1957

Attorney-General v. P. Y. A. Quarries Ltd.

the defendant quarry owners were committing a public nuisance the trial judge granted injunctions restraining the defendants from carrying on their business of quarrying in such a manner as to cause, by blasting, stones and splinters to be projected from the confines of the quarry, or to cause a nuisance to Her Majesty's subjects by dust and vibration. The defendants, having made certain improvements in their system of blasting, which they claimed complied with the injunction as to the projection of stones, now appealed against the order as to dust and vibration. They contended, inter alia, that the judge had failed to distinguish between a public nuisance, which affected all the subjects of Her Majesty living in the area concerned, or passing through it, and a private nuisance affecting only a limited number of residents and giving rise only to an action for damages. They submitted that the question of dust and vibration should at the worst be treated as a private nuisance:—

Held, that any nuisance which materially affected the reasonable comfort and convenience of life of a class of Her Majesty's subjects was a public nuisance; that the sphere of the nuisance might be described generally as "the neighbourhood," but the question whether the local community within the sphere comprised a sufficient number of persons to constitute a class of the public was a question of fact in every case; and that the judge, having determined that question against the defendants, had rightly granted the injunctions, and the appeal failed.

Attorney-General v. *Keymer Brick and Tile Co. Ltd.* (1903) 67 J.P. 434; *Attorney-General* v. *Stone* (1895) 12 T.L.R. 76; *Attorney-General* v. *Cole & Son* [1901] 1 Ch. 205; and *Attorney-General* v. *Corke* [1933] Ch. 89; 48 T.L.R. 650 followed.

Per Denning L.J. I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

Appeal from Oliver J. (Glamorgan Assizes).

On April 25, 1956, Oliver J. granted an injunction restraining the defendants, P.Y.A. Quarries Ltd., from carrying on their business of quarrying at Penyralltwen, near Pontardawe, in the county of Glamorgan, in such a manner as to cause stones or splinters to be projected from the confines of the quarry, or to occasion a nuisance to Her Majesty's subjects by dust or vibration. The action in which the order was made had been brought by the Attorney-General on the relation of the Glamorgan County Council and the Pontardawe Rural District Council, and it was founded upon an alleged public nuisance under the three broad headings dealt with by the order of the judge. The nuisances complained of were alleged to have existed since about 1947.

The defendants, having carried out certain developments in their system of blasting, which they claimed remedied the nuisance complained of in the projection of stones, now appealed against the order of the judge in so far as it dealt with the questions of dust and vibration, which, they contended, were at the worst merely private nuisances and only gave rise to actions for damages.

F. W. Beney Q.C., *Dyfan Roberts* and *Ronald Maddocks* for the defendants. The defendants are only concerned in this appeal with the order of the judge so far as it applies to the questions of vibration and dust. The order as to flying stones, it is submitted, has been complied with as far as possible. It is impossible to carry on a quarry without a certain amount of vibration and dust, and if the order of the judge is affirmed it will mean that this quarry, which has been worked for a good many years, will have to be closed down, or it may be sequestrated. Only a limited number of the residents living in the vicinity have complained, but there has been something in the nature of a campaign to close down the quarry. It is not disputed that there may be a private nuisance affecting some of the residents, who may have claims for damages. But here only a public nuisance is alleged, which is in the nature of a criminal offence, and must be found to affect all Her Majesty's liege subjects living in the area concerned. The judge has drawn no distinction between a public and a private nuisance. There appears to be no case decided in which vibration has been regarded as a public nuisance. It is submitted that vibration and dust do not amount to a public nuisance. To throw stones out promiscuously on to a highway is quite a different thing. One is then doing something which is a source of danger and inconvenience to all Her Majesty's subjects in, or coming within, the area, and is a public nuisance.

Tests have been made as to the extent of the alleged vibration, and the reports showed that the vibration was very slight and were entirely favourable to the defendants. They gave no support to the damage alleged by complainants to have been done to houses, but the judge, while agreeing that there was some exaggeration, accepted the evidence of the complainants. Chitty's Criminal Law gives no precedent of an indictment either for vibration or dust as being a public nuisance (vol. 3, p. 607 et seq.). The indictment must contain the words "all the liege subjects "of our Sovereign Lord the King," or similar words. "Divers "subjects" has been held to be not sufficient. If a private person suffers damage by a nuisance he can recover damages, but unless it affects all the Sovereign's subjects in the area it is not a public nuisance. There have been cases where vibration has been held to be a private nuisance, but public nuisance has always been regarded as an infringement of the Sovereign's right and therefore treated as a criminal indictment. There must be some reason for the inclusion of the words "all the liege subjects "of our Sovereign Lord," etc.

So far as the question of vibration is concerned, the plaintiffs have not shown that at the date of the writ there was any public nuisance arising from that cause. Therefore there should have been no order against the defendants in respect of vibration. If there had been sufficient to amount to a public nuisance at that date, then the judge, in considering whether he should or should not grant an injunction, failed to take into account the extent to which the effect on the residents was due to freak blasts.

[DENNING L.J. Freak explosions may have resulted from the mis-numbering of the detonators.]

Or to some peculiarity in the formation of the rock. What lies at the bottom of this case is that the complainants object to the noise of the blasts. Vibration means vibration and not fear of it, as the judge has found. As to dust, it came ultimately to be rather a complaint that dust was due to leaving a door open, and the evidence fell far short of establishing that all the residents in the area were adversely affected. [Reference was made to *Southport Corporation* v. *Esso Petroleum Co. Ltd.*[1]; *Attorney-General* v. *Sheffield Gas Consumers*[2]; *Soltau and Newall* v. *De Held*[3]; *Rex* v. *Lloyd*[4]; *Attorney-General* v. *Garner*[5]; *Attorney-General* v. *Great Eastern Railway Co.*[6]; *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.*[7]; *Attorney-General* v. *Corke*,[8] and *Rex* v. *White and Ward.*[9]]

H. Edmund Davies Q.C., *Morgan Evans* and *Michael Evans* for the plaintiffs. These proceedings arose following vehement complaints made for a number of years by a community living in a small village. It is not the law that in order to establish a public nuisance one must call 30 to 40 people as complainants.

[1] [1954] 2 Q.B. 182, 196; [1954] 2 All E.R. 561.

[2] (1850) 3 De G.M. & G. 304.

[3] (1851) 2 Sim.N.S. 133.

[4] (1800) 170 E.R. 691; 4 Esp. 200.

[5] [1907] 2 K.B. 480.

[6] (1879) 11 Ch.D. 449, 482.

[7] (1889) 21 Ch.D. 752.

[8] [1933] Ch. 89.

[9] (1757) 1 Burr. 333, 337.

It is a matter of degree, and accordingly a matter of fact, and in coming to a conclusion it is impossible to minimize the advantage which a judge has in being on the spot.

It is submitted that: (1) "A common nuisance is an act not "warranted by law or an omission to discharge a legal duty, "which act or omission obstructs or causes inconvenience or "damage to the public in the exercise of rights common to all "Her Majesty's subjects." [Stephen's Digest of Criminal Law, 7th ed., art. 255, p. 178.] (2) A public nuisance may exist even though (*a*) only a limited neighbourhood is affected thereby; (*b*) only some of the public are inconvenienced thereby; provided that a substantial number are inconvenienced. It is not right to regard the propinquity of a highway as essential. [Reference was made to *Reg.* v. *Garland* [10]; *Attorney-General* v. *Keymer Brick and Tile Co. Ltd.*[11]; *Reg.* v. *Price* [12]; *Attorney-General* v. *Plymouth Fish Guano and Oils Co.*[13]; *Attorney-General* v. *Stone* [14]; *Attorney-General* v. *Corke* [15]; *Rex* v. *Byers* [16]; *Rex* v. *Lloyd*,[17] and *Attorney-General* v. *Cole & Son.*[18]] (3) Evidence that a particular person has sustained special damage or discomfort may properly be admitted to prove a public nuisance even though that evidence may also support a claim to damages for a private nuisance: *Reg.* v. *Mutters* [19]; also *Attorney-General* v. *Stone* [20] and *Attorney-General* v. *Corke.*[21] (4) Vibration and dust are each capable in law of constituting a public nuisance. There cannot be any distinction between dust and smell and vibration and noise. There appears to be no reported case of a public nuisance caused by vibration, but there is no reason why dust and vibration should not create a public nuisance. It is a matter of degree depending on its effect on a complainant. (5) The trial judge properly directed his mind to the distinction between a public and a private nuisance.

The only way in which the judgment can be attacked is by saying that the evidence was so inadequate that the judge could not hold that a public nuisance had been established. [*Bolton* v. *Stone* [22] was referred to.] An isolated offence against the order made by the judge would not justify a charge of a breach of the order: see Kerr on Injunctions, 6th ed., pp. 673, 674; also

---

[10] (1851) 5 Cox C.C. 165.
[11] (1903) 67 J.P. 434.
[12] (1884) 12 Q.B.D. 247, 256.
[13] (1911) 76 J.P. 19.
[14] (1895) 12 T.L.R. 76.
[15] [1933] Ch. 89.
[16] (1907) 71 J.P. 205, 207.
[17] 4 Esp. 200.
[18] [1901] 1 Ch. 205.
[19] (1864) Leigh & Cave 491.
[20] 12 T.L.R. 76.
[21] [1933] Ch. 89.
[22] [1951] A.C. 850; [1951] 1 All E.R. 1078.

Halsbury's Laws of England, vol. 24, p. 24. The words of the judgment clearly show that the judge had under consideration the distinction between a public and a private nuisance. It is not essential even in the case of a private nuisance to prove that the damage is real. It is sufficient that the complainant has fear of damage if the judge finds that the fear is reasonable. Inconvenience and interference being established, it does not matter whether the nuisance is private or public. Public nuisance need not in law be shown to be injurious to health: *Attorney-General* v. *Keymer Brick and Tile Co. Ltd.*[23]

(6) There was ample evidence that a public nuisance by both dust and vibration had been committed. Four questions arise on this submission: Have common rights been invaded? Were they substantially invaded so as to interfere with reasonable comfort? Have the public been inconvenienced thereby? Assuming a public nuisance, did it exist at the date of the writ? (7) Upon the evidence the granting of an injunction, limited as this one was, was a proper exercise of the judge's discretion. This is entirely a matter of fact and the judge's finding ought not to be disturbed. An injunction cannot be enforced by a writ of sequestration unless the order has been deliberately breached: Halsbury's Laws of England, vol. 18, p. 125. In the present case there was clear and satisfactory evidence that the matters complained of need never have arisen if the defendants had followed the advice given to them by their own advisers. [*Wing* v. *London General Omnibus Co.*[24] and *Spokes* v. *Banbury Board of Health*[25] were also referred to.]

Beney Q.C. in reply. The judge has not correctly applied the law. This is an action to stop a public nuisance and not an action to restrain the defendants from annoying their neighbours.

Cur. adv. vult.

DENNING L.J. I will ask Romer L.J. to deliver the first judgment.

ROMER L.J. This is an appeal from an order of Oliver J., dated April 25, 1956, whereby he granted an injunction restraining the defendants from carrying on the business of quarrying at Penyralltwen, near Pontardawe, in the county of Glamorgan, in such a manner as to cause stones or splinters to be projected from the confines of the quarry or to occasion a nuisance to Her Majesty's subjects by dust or by vibrations. It will be observed that whereas the injunction is unqualified as to the stones and splinters therein mentioned, it is confined, so far as dust and vibration are concerned, to occasioning a nuisance to Her Majesty's subjects. The defendant appellants are only challenging the second part of the order, namely, the injunction with regard to dust and vibration. The action has been brought by the Attorney-General on the relation of the Glamorgan County Council and the Pontardawe Rural District Council, and it is founded upon a public nuisance under the three broad headings which were dealt with by the order of the judge. The statement of claim alleges that the nuisances complained of have existed since about 1947.

---

[23] 67 J.P. 434.

[24] [1909] 2 K.B. 652.

[25] (1865) L.R. 1 Eq. 42.

The defendant company was incorporated in 1929 but apparently carried on its activities on a somewhat modest scale for some years. In 1947 the Pontardawe Rural District Council granted permission to the company, under the Town and Country Planning Acts, for the further working of the then existing quarry, subject to certain conditions, one of which was that the council should be satisfied that the utmost precautions would be taken to prevent nuisance from dust. In 1949 Bryndley Thomas became a director of the defendant company: there were then three other directors, namely, Wyndham Thomas, Jim Morris and Illtyd Williams, the last named gentleman being also the manager. From 1951 onwards Bryndley Thomas and Wyndham Thomas took over the management of the business, and Illtyd Williams left in the same year.

The defendants' quarry adjoins a highway called the Alltwen–Brynllewellyn highway, which runs roughly east and west. Immediately east of the quarry is a footpath which leads in a northerly direction from the highway. To the east of this footpath are eight dwelling-houses abutting onto the highway and on the north side of it. The nearest of these houses is about 50 yards from the nearest point of the quarry. Close to the quarry on the west side of it, and also abutting onto the highway on the north side, are some 20 houses, of which the nearest is 35 yards from the quarry and the furthest about 260 yards. About 250 yards to the south of the quarry is a farm called Alltwenganol, which is surrounded by fields. To the north-west of the quarry is another highway, called Dyffryn Road, which, at its closest proximity to the quarry (a matter of some 360 yards), is used for residential purposes.

The locality is shown in detail in a plan which was put in evidence at the trial, and the judge gave the following general description of it. "Round the quarry on both sides of it," he said, "can be seen groups of houses. The quarry, according "to the evidence, is not more than about 25 or 26 years old; that "is to say, it has not been an open quarry for longer than that; "that it has not been worked. But many of these little houses. "I think, have been built much longer than that. They form "a little colony. One does not see any particular reason for "their existence at that place; certainly nothing to do with "the quarry. But one assumes that they were houses for "people who found Pontardawe—which is away to the left of "the plan—not a particularly charming place to live in and "came to move out to these little houses, where they have, "certainly on three sides, some very beautiful Welsh scenery, "with fine hills and valleys. That, I take it, was the reason "these houses were built, and that is the nature of the people "who occupy them; people who are not interested in the quarry "at all, who have other occupations, who follow all sorts of "occupations. Some work in steel; there is a lady, Mrs. Davies, "who is a justice of the peace; there is a schoolmaster or two, "and one with academic distinction, a bachelor of science; and "there are all sorts of mixed people."

Some time before the year 1949 the activities of the defendants in their quarrying operations considerably increased, and some of the householders living in the vicinity of the quarry began to complain to the local authorities. In June of 1949 thirty local residents presented a petition to the Pontardawe Rural District Council in which, after stating that innumerable complaints had been made to the managing director of the defendant company over a long period, they stated: "On a number of occasions "damage by flying stones has been done to houses in the "vicinity of the quarry and recently a pane of a kitchen window "was blown in by blast, littering a breakfast table with jagged "pieces of glass, the wife in the home narrowly escaping injury. "We sincerely believe that your authority cannot fail to realize "the seriousness of the position and the earnestness of our "protest against: 1. The manner in which blasting operations "are carried out regardless of the risk of damage to our homes. "2. The flying pieces of rock on occasions following blasting "operations landing some distance from the quarry constitute a "very serious menace to life inside and outside the home and "to users of the public highway. 3. The dust nuisance caused "by stone crushing, the dust penetrating the houses and having "injurious effects. The dust on occasions makes the use of the "main road for some distance unpleasant and unhealthy. We "appeal to the members of your authority responsible for the "interests of the ratepayers to take immediately whatever action "may be necessary to remove the causes of our protest."

Following upon the receipt by the council of this petition their public health committee held a number of meetings at which they considered the position, and after a meeting which took place on December 13, 1949, between the committee and representatives of the defendants and a deputation from the residents, a sub-committee of the council, which had been appointed, visited the quarries and watched the defendants' operations and as a result reported that the dust nuisance at the quarries was negligible, and further that no splinters fell outside the perimeter of the quarry during blasting operations. As a result, however, of further complaints from local residents further trials were carried out, and on April 27, 1950, a vibration test was conducted at the quarry. As the result partly of this test the committee still appeared to be of the opinion that no action could be taken against the defendants, as appears from some minutes which were put in evidence.

Complaints from the residents continued to be made, and on July 8, 1950, the clerk of the Glamorgan County Council wrote to the defendants calling their attention to the fact that stones and splinters were falling upon or being blasted across the highway which adjoined the quarry and asking them for an assurance that adequate steps would be taken forthwith to ensure that such a practice should cease. That letter remained unanswered. The clerk of the county council wrote again on July 20, 1950, and on July 26, 1950, received a letter from the defendants to the effect that they were "taking extraordinary "precautions" during the blasting operations. A meeting took place between the Pontardawe Rural District Council and the defendants, and on March 15, 1951, the clerk to the council wrote to the defendants saying that the nuisance resulting from their quarrying operations had not been abated and was unlikely to be abated for a substantial period if at all, and that the council had decided to take appropriate proceedings to secure the abatement of the nuisance. In fact, however, the writ in this action was not issued until July 4, 1952. In the meantime, however, and indeed from the early summer of 1950, letters of complaint had been arriving in a steady stream at the offices of the relator councils from persons who lived in the neighbourhood of the quarry. It will be necessary to refer in greater detail to these complaints later on in this judgment, but it is enough for the moment to say that although most of them related to the projection of stones from the quarry (a natural emphasis, having regard to the potential danger to property and personal safety arising from the bombardment), some of the complaints referred also to vibration and dust.

During the last few years certain changes and developments have taken place in the quarrying plant on the defendants' premises and in their operational methods. Up to 1950 the defendants drilled 12 ft. holes of 1⅛ ins. diameter. The holes, four to six in number, were drilled 3 ft. to 4 ft. back from the face of the quarry and about 6 lb. of explosive were used in each hole. These charges were fired simultaneously and produced a fall of 80 to 100 tons of stone. This material was then lifted by crane from the base of the quarry, put on to skips and taken to a crusher, which was in the open. This crusher was only capable of dealing with stones of about 10 ins. by 6 ins. In order to reduce large stones to the capacity of the crusher they were drilled to about half of their depth, stemmed with 1-oz. or 2-oz. cartridges and detonated. This process was known as "popping," and it was the practice to explode 12 to 15 stones in this manner by simultaneous detonation. At this time there were four or five main explosions every week, and "popping" took place up to three times a day.

In 1950 the defendants obtained planning permission to instal vibratory screens and a new crusher, with a view to reducing the dust which emanated from the plant. In the same year they began on the installation of these units and also on the construction of a new road leading to the quarry base. The object of this road, which came into use towards the end of 1951, and was completed in 1952, was to enable an excavator to be taken to the face of the quarry so as to save men from having to load stone on to the skips. The construction of this road involved a good deal of blasting near the highway. The defendants obtained the new crusher in April, 1951, and it was capable of taking stones up to 20 ins. by 10 ins. At the end of 1952 the defendants bought an additional crusher, known as a "skull "breaker," which could take stones of 4 ft. by 16 ins. thick. The object of this piece of plant was to reduce "popping," and since its acquisition this procedure had been reduced to some three times a month. Bryndley Thomas said in evidence that the defendants have been able to go for four or five weeks without having to "pop" at all.

The system of major blasting, already referred to, continued up to 1953, when the defendants obtained drills capable of drilling down to 24 ft. These drills had the same bore as the previous ones but the holes were drilled 4 ft. to 6 ft. back from the face and 12 lb. of powder were used in each hole. The charges, usually four to six in number, were fired simultaneously, as before, and a fall of 300 to 400 tons of rock was obtained from each explosion. In June, 1952, the defendants had consulted one F. C. Rosling, who is an associate member of the Institute of British Engineers, a member of the Institute of Quarrying, and is in private practice as a consultant in quarry blasting, etc. This gentleman, who gave evidence at the trial, advised the defendants to procure what is called a "wagon drill," which, in his view, would eliminate all further cause for complaint arising from their operations at the quarry. This apparatus drills to a depth of 40 ft. with a diameter of 2½ ins., and the defendants somewhat belatedly bought one: it was installed in their quarry towards the end of 1953 and the defendants have used it ever since. With it they drill up to 12 holes, 12 ft. to 14 ft. back from the face, and put a charge of 30 to 35 lb. of explosive in each hole. The charges are fired by what are called delayed detonators. This involves an almost infinitesimal time lag between each detonation. The effect of this procedure is that, although a bystander is only conscious of one explosion, each charge is in fact detonated separately. The object of installing the wagon drill was not only to prevent the ejection of stones outside the quarry but also to obviate vibration from the main explosions. As each of these explosions brings down 3,000 to 4,000 tons of stone they only have to be effected once every five or six weeks.

On August 26, 1952, a second vibration test was carried out by one D. Stenhouse. This gentleman, who is a B.Sc. in Mining, furnished the defendants with a report upon this test and also gave evidence about it at the trial. I refer further to this hereafter.

The action came on for hearing before Oliver J. on April 11, 1956, and the trial occupied nine or 10 days. In addition, the judge devoted a day to a view of the premises, and blasting operations were carried out in his presence. In the course of his judgment he arrived (in brief) at the following findings. So far as the flying stones were concerned, he said that there was really no defence at all; that the case was "absolutely proved "at the time the writ was issued"; and that, notwithstanding the installation of the wagon drill, he was quite satisfied that the nuisance had not been wholly abated and that he should grant an injunction. As to vibration, he came to the conclusion "that "for some reason—I cannot tell what it is—there is on occasion "such vibration as to frighten people, to shake their houses and "to make them thoroughly uncomfortable, and that such vibra-"tion as that, when it is caused, is a nuisance and must cease." With regard to dust, he said that it would not be right to base an injunction on the explosions, having regard to their comparative rarity since the end of 1953, but that excessive dust emanated from the secondary crusher when the door leading into it was left open, as was frequently the case. Finally he said: "I have no doubt that there is dust nuisance from this place— "of course, only in dry weather. I have no doubt that they "have not done anything to cope with it and I am going to order "them to do so by injunction."

Mr. Beney, in challenging the injunction which the judge granted in relation to vibration and dust, based his criticisms of the judgment on the following general grounds. He first submitted that the judge approached the matter as though it was a private, and not a public, nuisance which was in issue; and that he applied tests and followed lines of inquiry which are apt and relevant in cases of private nuisance but which are to some extent irrelevant, and are certainly indecisive, where a public nuisance is alleged. Mr. Beney's second submission (which is to some extent associated with the first) was that the judge paid insufficient attention to the expert evidence which was called before him. The third criticism of the judgment is that the judge failed to address his mind to the position as it existed at the date of the writ but primarily founded his decision to grant the injunctions now complained of on incidents which had occurred between the writ and the trial.

Before considering these contentions in any detail it would, I think, be convenient to consider the nature of a public nuisance as distinct from nuisances which are customarily described as "private." At page 1392 of the 33rd edition of Archbold's Criminal Pleading there is given a precedent of an indictment for carrying on an offensive trade; so far as material it is in the following form: "A.B. (on such and such a day) in the County "of London, caused a nuisance to the public by allowing offensive "and unwholesome smells to be emitted from furnaces or "boilers in which tripe was being burnt or boiled by the said "A.B., which nuisance the said A.B. still continues." We were told that that form and the notes which follow it have appeared substantially unchanged in each successive edition since earliest times. It is stated in these notes (inter alia): "prove that the "smoke or smell arising from (the boiler) was either injurious "to health or so offensive as to detract sensibly from the enjoy-"ment of life and property in its neighbourhood . . . It is not "necessary that the smells produced by it should be injurious "to health; it is sufficient if they are offensive to the senses . . . "Prove also that it is in a populous neighbourhood, or near a "highway . . . for its being a nuisance depends in a great "measure upon the number of houses and the concourse of "people in its vicinity, which is a matter of fact to be determined "by the jury."

In Stephen's Digest of the Criminal Law (8th ed.), page 184, it is stated that "A common nuisance is an act not warranted "by law or an omission to discharge a legal duty, which act or "omission obstructs or causes inconvenience or damage to the "public in the exercise of rights common to all His Majesty's "subjects."

The following definition of nuisance appears in Blackstone's Commentaries (Vol. III, Chapter 13, page 216): "Nuisance, nocu-"mentum, or annoyance, signifies anything that worketh hurt, "inconvenience, or damage. And nuisances are of two kinds; "*public* or common nuisances, which affect the public, and are an "annoyance to *all* the King's subjects; for which reason we "must refer them to the class of public wrongs, or crimes and "misdemeanors: and *private* nuisances; which are the objects of "our present consideration, and may be defined, anything done "to the hurt or annoyance of the lands, tenements or heredita-"ments of another." This passage from Blackstone is cited in Pearce & Meston's Law of Nuisances, page 1, and the learned authors point out that "anything that worketh hurt, incon-"venience or damage" is too broad as including many things which are not nuisances, being damna sine injuria.

Finally, in a form of indictment for a public nuisance by smells given in Chitty on Criminal Law (2nd ed.), volume III, pages 652–654, the relevant allegation is that the air was "corrupted and rendered very insalubrious to the great damage "and common nuisance of all the liege subjects of our said "Lord the King, not only there inhabiting and residing, but also "going, returning, and passing through the said streets and "highways, and against the peace, etc."

It is difficult to ascertain with any precision from these citations how widely spread the effect of a nuisance must be for it to qualify as a public nuisance and to become the subject of a criminal prosecution or of a relator action by the Attorney-General. It is obvious, nothwithstanding Blackstone's definition, that it is not a prerequisite of a public nuisance that all of Her Majesty's subjects should be affected by it; for otherwise no public nuisance could ever be established at all.

In *Soltau* v. *De Held*[1] Kindersley V.-C. said: "I conceive "that, to constitute a public nuisance, the thing must be such as, "in its nature or its consequences, is a nuisance—an injury or a "damage, to all persons who come within the sphere of its opera-"tion, though it may be so in a greater degree to some than it is "to others."

In *Rex* v. *White and Ward*[2] the defendants had been convicted of a public nuisance on an indictment which charged that "at the parish of Twickenham, etc., near the King's Common "highway there, and near the dwelling-houses, of several of "the inhabitants, the defendants erected twenty buildings for "making noisome, stinking and offensive liquors." Objection was made that the indictment was only laid generally "in the "parish of Twickenham." Lord Mansfield rejected the objection, saying: "It is sufficiently laid, and in the accustomed "manner. The very existence of the nuisance depends upon "the number of houses and concourse of people: and this is a "matter of fact, to be judged by the jury."

In *Rex* v. *Lloyd*[3] an indictment for a nuisance by noise was preferred by the Society of Clifford's Inn. It appeared in evidence that the noise complained of affected only three houses in the Inn. Lord Ellenborough said that upon that evidence the indictment could not be sustained; and that it was, if anything, a private nuisance. It was confined to the inhabitants of three numbers of Clifford's Inn only; it did not extend to the rest of the Society and could be avoided by shutting the windows; It was, therefore, not sufficiently general to support an indictment.

In *Attorney-General* v. *Sheffield Gas Consumers Co.*[4] it was submitted in argument that it was the duty of the Court of

---

[1] (1851) 2 Sim.N.S. 133, 142.

[2] (1757) 1 Burr. 333, 337.

[3] (1800) 4 Esp. 200.

[4] (1853) 3 De G.M. & G. 304, 320.

Chancery to interfere by way of injunction in all cases of public nuisance, whatever might be the position in the case of private nuisances. In the course of his judgment Turner L.J. said: "It is not on the ground of any criminal offence committed, or "for the purpose of giving a better remedy in the case of a "criminal offence, that this court is or can be called on to "interfere. It is on the ground of injury to property that the "jurisdiction of this court must rest; and taking it to rest upon "that ground, the only distinction which seems to me to exist "between cases of public nuisance and private nuisance is this— "that in cases of private nuisance the injury is to individual "property, and in cases of public nuisance the injury is to the "property of mankind."

In *Reg.* v. *Price* [5] a question arose whether the burning of a dead body, instead of burying it, amounted to a public nuisance. In the course of his charge to the jury Stephen J. said [6]: "The "depositions in this case do not state very distinctly the nature "and situation of the place where this act was done, but if you "think upon inquiry that there is evidence of its having been "done in such a situation and manner as to be offensive to any "considerable number of persons, you should find a true bill."

In *Attorney-General* v. *Keymer Brick and Tile Co. Ltd.*[7] Joyce J. said: "The only question I have to decide is purely "one of fact, namely, whether or not what the defendants have "done has created or occasioned a public nuisance within the "neighbourhood of their brickfields. Now, in law a public "nuisance need not be injurious to health. It is not necessary "to show that people have been made ill by what had been "done. It is sufficient to show that there has been what is called "injury to their comfort, a material interference with the com-"fort and convenience of life of the persons residing in or coming "within the sphere of the influence of that which has been done "by the defendants on their works . . . The conclusion I have "arrived at is that . . . a serious and disgusting public nuisance "has been occasioned by the defendants in the neighbourhood of "their brickworks." The form of injunction granted in that case was (so far as relevant) to restrain the defendants from performing specified acts "so as by noxious or offensive odours "or vapours arising therefrom or otherwise to be or occasion a "nuisance to the annoyance of persons in the neighbourhood of

---

[5] (1884) 12 Q.B.D. 247.

[6] Ibid. 256.

[7] (1903) 67 J.P. 434.

"the defendants' brickfields and lands, or so as to be or become "injurious to the public health."

The expression "the neighbourhood" has been regarded as sufficiently defining the area affected by a public nuisance in other cases also. (See, for example, *Attorney-General* v. *Stone*,[8] *Attorney-General* v. *Cole*,[9] and *Attorney-General* v. *Corke*.[10])

I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the textbooks and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue.

It is convenient now to turn to the evidence which was called before the judge as to the state of affairs with regard to vibration and to dust as it existed in the summer of 1952. The criticisms of the judgment to which I have already referred must, of course, be considered, but it is on the evidence, when related to the legal principles just mentioned, that this appeal falls to be determined.

[His Lordship summarized the evidence, including that of Mr. Ieuan Lewis, senior sanitary inspector of the Pontardawe Rural District Council, and continued:] Upon that evidence the question has to be resolved whether the plaintiffs succeeded in establishing that a public nuisance from (a) vibration and (b) dust was being caused by the defendants' quarrying operations at the date of the writ; and, if so, whether in view of the remedial measures which the defendants have taken since July, 1952, the court should interfere with the injunctions which the judge thought it right to grant.

Mr. Beney's main submission with regard to vibration was that, even on the assumption (which he did not admit) that one or more individuals might have successfully instituted proceedings for private nuisance in 1952, the evidence does not show that a

[8] (1895) 12 T.L.R. 76.

[9] [1901] 1 Ch. 205.

[10] [1933] Ch. 89; 48 T.L.R. 650.

sufficient number of persons were affected by vibration to justify the nuisance (if any) being regarded as a public nuisance. He said that vibration differs fundamentally from such things as noise or the pollution of the atmosphere. In nuisances such as those, he said, the court might well infer from the evidence of some of the affected class an injury to the class as a whole; but that no such inference can fairly be drawn in the case of vibration, which is largely a matter of individual susceptibility. I agree with Mr. Beney that vibration is in some respects to be approached on a different footing from noise and smell; and the fact that one person reasonably suffers discomfort from vibration does not necessarily establish that his neighbour has been similarly affected. I am in the present case satisfied, however, that a nuisance from vibration existed in 1952 and that it was sufficiently widespread to amount to a common, or public, nuisance.

As I have earlier indicated, this question is one of fact, and the judge decided it adversely to the defendants, and it appears to me to be impossible to say that in view of the 1949 petition, the letters of complaint and the oral evidence, the judge arrived at a wrong decision. It is true that the complaints as to vibration (and indeed as to dust) were fewer and less emphatic than the complaints as to flying stones; they came, however, from a number of persons living to the east and south of the quarry; and the judge, who saw the witnesses, was satisfied that the complaints were genuine. Mr. Beney's complaint that the judge paid no or insufficient attention to the vibration tests and to the evidence of Stenhouse (an expert on vibration on the staff of I.C.I.) is, in my opinion, ill-founded. It seems clear to me that he had these matters in mind when he considered in the course of his judgment whether the plaintiffs had established that the vibration had caused structural damage to houses and came to the conclusion that they had not.

By reason of the judge's finding on this point I omitted in my review of the evidence most of the complaints (and they were many) of damage, both structural and otherwise, to the complainants' houses. The principal ground on which the judge gave relief was that "if reasonable people on reasonable grounds do "believe that their houses are being shaken to pieces they will "be just as much harassed and distressed, and just as much "unjustly harassed and distressed, as if the damage was in fact "being so caused." I see no reason to quarrel with that view. Moreover, there was a body of evidence as to personal discomfort, apart from fear of damage to houses. It is true, as Mr. Beney pointed out, that the judge was particularly impressed by three incidents which occurred on July 1, 1955, August 30, 1955, and January 3, 1956; and that all of these occurred a considerable time after the issue of the writ. It is clear from the judgment, however, that he was mindful of past history; for example, he said: "The question is, do I accept the evidence of these "witnesses that this vibration has existed for so long and "has recently been intensified in degree, though lessened in "frequency," which shows beyond doubt that he was not confining his attention to the current or recent position.

It is also to be observed that the principal interest at the trial centred not so much on whether the various nuisances which were complained of had existed in 1952, but whether they still continued to exist notwithstanding the efforts which the defendants had made (and successfully made according to them) to stop them. In these circumstances it is not surprising that the emphasis of much of the evidence, as of the judgment also, was rather upon recent than upon former events. But it is clear to me that the judge was intending to find, and did find, that a public nuisance existed before action brought in relation to vibration as well as to flying stones; and there is, in my judgment, no ground for disturbing his decision.

The observations which I have made with reference to vibration apply in the main also to the question of dust. Mr. Beney's submissions as to the local effect of vibration do not, of course, apply to dust, which pollutes the air just as much as smoke or smells pollute it; and subject, of course, to such considerations as the direction of the prevailing wind it is a legitimate inference that if one householder is affected by the emanation and deposits of dust then his neighbour will be affected likewise. On the other hand, a dust nuisance, such as that of which residents complained in the 1949 petition, and in their letters, is seasonal in that, generally speaking, it only exists in the summer. It could hardly be suggested, however, on that score, that a dust nuisance could not be actionable; nor was it suggested in the present case. What was suggested on behalf of the company was that the inconvenience from dust of which witnesses gave evidence at the trial arose from the doors to the crusher being left open and that this causation did not arise until after these proceedings had been commenced. This, however, is not so, as is shown by Lewis's reports on dust in 1952. The evidence of Lewis and the 1949 petition and the complaints of the residents to which I have earlier referred leave me in no doubt that the judge was amply justified in the view that a nuisance from dust existed in 1952, and that a sufficient number of people were affected by it to constitute, for relevant purposes, a class of Her Majesty's subjects. It is true that the judge does not seem to hold in so many words that the nuisance existed in 1952, but I need not repeat on this subject what I said with regard to it in relation to vibration. It is quite clear that the judge was fully alive to the importance of the position as it existed at the date of the writ notwithstanding that his judgment on this, as well as on the other issues, was directed more to later events.

Before proceeding to the final question which has to be considered, namely, whether, although a nuisance from vibration and dust existed when the action was started, the position has so improved since then that no injunction should issue, I should like to say a word or two on a question which resulted in the amendment of the statement of claim in these proceedings and on which there was some discussion before us. In the statement of claim, as originally delivered, allegations were made to the effect that the nuisances complained of caused damage to the occupiers of the adjacent houses and land; that the vibrations were a source of danger to the houses, and that the dust settled upon them and made them dirty and uncomfortable to live in. The statement of claim was subsequently amended by striking out these allegations, because it was thought that they were irrelevant in an action founded upon public nuisance (though, rather curiously, they substantially reappeared in some very detailed particulars of the statement of claim which were given later). The reasons underlying these amendments were supported before us by counsel for the appellants, and it was suggested, as I followed the argument, that in a public nuisance action evidence of individual experiences should not be received, although such evidence would be highly relevant in cases of alleged private nuisance. I cannot for myself accept this contention. Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances. I am therefore of opinion that there was nothing improper or irregular in the statement of claim as originally delivered or in the reception at the trial of evidence of the local residents' experiences.

Finally, then comes the question already mentioned, is the Attorney-General entitled to an injunction or ought some more limited form of relief to be granted in view of the various steps which the defendants have taken since 1952? The defendants contend that these measures have been so effectual that the proper order is to give the plaintiffs liberty to apply for injunctions with regard to vibration and dust; and that the injunctions granted by the judge should accordingly be discharged. Prima facie, if a nuisance, whether public or private, is shown to have existed at the time the writ was issued the plaintiff is entitled to an injunction. If, however, between the writ and the trial the nuisance has been abated the court will usually stay its hand and merely give the plaintiff leave to apply in the action for an injunction if the trouble should recur. It seems to me, however, that it is quite impossible to say that the nuisance from vibration or dust had been wholly abated at the time when this action came to trial. As a result of installing the wagon drill towards the end of 1953 blasting had undoubtedly become far less frequent; on the other hand, its effects had become far more violent.

Dealing with this aspect of the matter the judge said: "There are three main dates complained of, but there are a "number of other occasions when tremendous vibration is com-"plained of. The three main dates, as I call them, are July 1, "1955, August 20, 1955, and January 3, 1956, and there is a "mass of evidence to the effect that, whilst in recent times the "explosions have been far fewer, and therefore the incidents "far fewer . . . they have been far more violent, at least on "occasions, and those three dates I have given are three "occasions. Each of them resulted in a petition signed by "many people in the neighbourhood and presented to the local "authority, complaining of this frightful shattering vibration." The judge then referred to some of the evidence which had been called before him as to these recent explosions and which left him in no doubt as to their violence. There is obviously, therefore, still ground for serious complaint of vibration, and in my judgment the judge was quite right in granting an injunction.

With regard to dust, the judge relied to some extent on what he saw when he visited the quarry premises towards the end of the trial. The main thing which impressed him was the amount of dust which resulted from the crushing operations. He said that he saw the door into the secondary crusher both open and shut, " and no one who saw it open could avoid seeing the cloud " of stuff that came pouring out from inside into the air." Apart altogether, however, from the judge's own observations there was ample evidence from local residents to show that they were still being troubled at the time of the trial by dust from the quarry during dry weather. There is no ground, therefore, in my opinion, upon which this court should interfere with regard to the injunction which the judge granted to restrain this nuisance.

Apart from the fact that the defendants had not abated (or, at all events, had not wholly abated) the nuisances by vibration and dust when the action came on for hearing, there are certain additional considerations which support the granting of the injunctions. In the first place, there is expert evidence to show that these nuisances are not inevitable; they can be avoided by the exercise of proper care. The second consideration arises from the past conduct of the defendants and their attitude from the outset to the very reasonable complaints which were brought to their attention. This element affords no ground in itself, of course, for any penal order being made; but it seems to me that an attitude of indifference to complaints tends to show irresponsibility and that, I think, is not an irrelevant consideration where the granting of an injunction is concerned. The judge expressed strongly his view that the defendants in the present case paid scant attention to the complaints of the residents or to the representations of the local authorities before (somewhat belatedly) the writ was issued; that they were dilatory in adopting an expert's suggestion as to the wagon drill; and that they never really exerted themselves to ensuring that the door to the crusher was kept shut as they were constantly being pressed to do, or to take other steps by the use of water or otherwise to prevent the escape of dust from the crushing plant. I do not propose to add to this already lengthy judgment by referring further than I have already done to the material upon which the judge based his view as to the defendants' conduct in the past, but it is obvious to me that the view was amply justified.

In my judgment, accordingly, the injunctions against which this appeal has been brought were rightly granted and the appeal fails. Mr. Beney, on behalf of the appellants, expressed some concern as to the future if the injunctions were not discharged. He said that, even though the expert witnesses had expressed views (as to vibration and dust respectively) that the quarry could be operated without occasioning a nuisance, an occasional incident might from time to time arise, unpredictable and unavoidable, which would or might lead to applications based upon contempt of court. Mr. Beney had especially in mind the fact that for no apparent reason some particular explosion was far more violent than those which normally occurred. Such an explosion had in fact occurred, for example, on January 3, 1956. Wyndham Thomas (a director of the company), amongst other witnesses, gave evidence as to these particularly heavy explosions and said they may occur when blasting for what he described as a "tight corner." He said: "It is a very unusual "shot, a freak blast which you get sometimes, that might not "happen in another 10 years." The defendants fear that this kind of thing, if and when it happens again, may be regarded by the inhabitants as a breach of the injunction as to vibration and be followed by an application for sequestration or attachment. I would point out, however, that none of the inhabitants could make such an application. The Attorney-General alone could make it, and presumably he would not apply unless, in his view, the circumstances warranted it. It may well be that he would not found an application upon some isolated incident if he were satisfied that no reasonable care on the part of the defendants could have avoided it. The defendants will doubtless adopt such expert advice as may be given to them with somewhat greater energy than they have shown at times in the past.

I would dismiss the appeal.

Denning L.J. I entirely agree with the judgment of Romer L.J. and have little to add. Mr. Beney raised at the outset this question: what is the difference between a public nuisance and a private nuisance? He is right to raise it because it affects his clients greatly. The order against them restrains them from committing a public nuisance, not a private one. The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much. The question, "When do a number of individuals become Her "Majesty's subjects generally?" is as difficult to answer as the question "When does a group of people become a crowd?" Everyone has his own views. Even the answer "Two's com-"pany, three's a crowd" will not command the assent of those present unless they first agree on "which two." So here I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look

C. A.
1957

ATTORNEY-GENERAL
v.
P. Y. A. QUARRIES LTD.

Denning L.J.

to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

Take the blocking up of a public highway or the non-repair of it. It may be a footpath very little used except by one or two householders. Nevertheless, the obstruction affects everyone indiscriminately who may wish to walk along it. Take next a landowner who collects pestilential rubbish near a village or permits gypsies with filthy habits to encamp on the edge of a residential neighbourhood. The householders nearest to it suffer the most, but everyone in the neighbourhood suffers too. In such cases the Attorney-General can take proceedings for an injunction to restrain the nuisance: and when he does so he acts in defence of the public right, not for any sectional interest: see *Attorney-General* v. *Bastow*.[11] But when the nuisance is so concentrated that only two or three property owners are affected by it, such as the three attornies in Clifford's Inn, then they ought to take proceedings on their own account to stop it and not expect the community to do it for them: see *Rex* v. *Lloyd*,[12] and the precedent in Chitty's Criminal Law (1826), vol. III, pp. 664–665.

Applying this test, I am clearly of opinion that the nuisance by stones, vibration and dust in this case was at the date of the writ so widespread in its range and so indiscriminate in its effect that it was a public nuisance.

But the defendants have now taken such good remedial measures that objectionable incidents take place only rarely and then by accident. So far as stones are concerned, the injunction is absolute: but so far as dust and vibration are concerned it is dependent on it being a nuisance "to Her Majesty's subjects," that is, a public nuisance. The question then arises whether every rare incident is a public nuisance. Suppose six months went by without any excessive vibration and then there was by some mischance a violent explosion on an isolated occasion terrifying many people. Would that be a public nuisance? Would it subject the defendants to proceedings for contempt? I should have thought that it might, but the punishment would

---

[11] [1957] 1 Q.B. 514; [1957] 1 All E.R. 497.

[12] 4 Esp. 200.

C. A.
1957

ATTORNEY-GENERAL
v.
P. Y. A. QUARRIES LTD.

Denning L.J.

be measured according to the degree to which the defendants were at fault.

I quite agree that a private nuisance always involves some degree of repetition or continuance. An isolated act which is over and done with, once and for all, may give rise to an action for negligence or an action under the rule in *Rylands* v. *Fletcher*,[13] but not an action for nuisance. A good example is an explosion in a factory which breaks windows for miles around. It gives rise to an action under *Rylands* v. *Fletcher*,[13] but no other action if there was no negligence: see *Read* v. *J. Lyons & Co.*[14] But an isolated act may amount to a public nuisance if it is done under such circumstances that the public right to condemn it should be vindicated. I referred to some authorities on this point in *Southport Corporation* v. *Esso Petroleum Co.*[15] In the present case, in view of the long history of stones, vibrations and dust, I should think it incumbent on the defendants to see that nothing of the kind happens again such as to be injurious to the neighbourhood at large, even on an isolated occasion.

I, too, would dismiss the appeal.

PARKER L.J. I entirely agree with both judgments.

Appeal dismissed.

Solicitors: *Waterhouse & Co. for T. W. James & Co., Swansea; Lewin, Gregory, Mead & Sons for Richard John, Cardiff.*

A. W. G.

---

[13] (1868) L.R. 3 H.L. 330.

[14] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[15] [1954] 2 Q.B. 182, 197; [1954] 2 All E.R. 561.

1957
May 2, 10.

Lord Goddard C.J., Hilbery and Donovan JJ.

REGINA *v.* GRIFFITHS AND OTHERS. *Ex parte* ATTORNEY-GENERAL.

Contempt of Court—Mens rea—Newspaper article—Innocent dissemination—Foreign periodical—Article prejudicial to defendant in criminal proceedings—Periodical edited and printed abroad—No *responsible editor or manager in this country—Importers and distributors no knowledge of contents of periodical—Liability of distributors—Whether innocent dissemination a defence.*

While a trial for murder was proceeding at the Central Criminal Court copies of an issue of the European edition of a foreign periodical containing comment on the trial and matter prejudicial to the accused man, which amounted to contempt of court, were on sale on bookstalls in London. The magazine was owned by a company registered in the United States of America and the European edition was compiled in New York and printed in Amsterdam whence it was sent by air for distribution. The company maintained an office in London, but there was no responsible editor or manager in this country. The distributors of the magazine in this country did not know that the issue in question contained comment on the trial and, on a motion by the Attorney-General for the issue of writs of attachment against them for contempt, they contended that, since they had no knowledge of the matter complained of and no reason to believe that the magazine was likely to contain such matter, they were innocent disseminators of the contempt and, as such, ought not to be held responsible:—

Held, (1) that when foreign publications which had no responsible editor or manager in this country were imported here the responsibility for their contents must be borne by the distributors who, in such circumstances, were the only persons amenable to the courts of this country.

(2) That in cases of contempt of court the defence of innocent dissemination was not available to those who in the way of their trade were responsible for putting the offending matter into circulation, and the distributors, therefore, must be held guilty of contempt.

Emmens v. *Pottle* (1885) 16 Q.B.D. 354; 2 T.L.R. 115 and *McLeod* v. *St. Aubyn* [1899] A.C. 549; 15 T.L.R. 487 distinguished.

MOTIONS for writs of attachment.

On April 4, 1957, while there was proceeding at the Central Criminal Court the trial of one John Bodkin Adams, a medical practitioner, on a charge of murder,[1] copies of an issue of a foreign weekly magazine, "Newsweek," which contained two paragraphs headed "The doctor on trial" and "Bequests," relating to the trial and highly prejudicial to the accused man, were on sale on bookstalls in this country. The magazine "Newsweek" was owned by a company registered in Dayton, Ohio, in the United States of America, and there was published, inter alia, a European edition which was compiled in New York and sent for printing to Amsterdam, whence it was distributed by air. The company maintained an office in London, but there appeared to be no responsible editor or manager in this country; the circulation manager resided in Paris, and the senior representative of the magazine in London was its chief European reporter, Eldon Wylie Griffiths, whose duties were merely those of a reporter who collected items of news in this country and sent them by cable to New York, and who knew nothing of the contents of the magazine until he saw the copy which arrived in this country.

---

[1] He was subsequently acquitted of the charge.

The magazine was imported into this country by Rolls House Publishing Company Ltd., which distributed about 9,000 copies weekly; about 1,800 copies weekly were distributed by W. H. Smith & Son Ltd., newsagents, who sold copies on their bookstalls. Neither Rolls House Publishing Company Ltd. nor W. H. Smith & Son Ltd. knew that the issue of the magazine contained the paragraphs commenting on the trial, and as soon as their attention was drawn to the matter they took immediate steps to stop its circulation.

The Attorney-General moved for writs of attachment against Eldon Wylie Griffiths, Rolls House Publishing Company Ltd., and their circulation manager, and W. H. Smith & Son Ltd. for their several contempts in distributing for publication by sale or causing to be sold and published the issue of the magazine in question, on the ground that the publication tended or was calculated to interfere with the due course of justice and to prejudice the fair trial of John Bodkin Adams who was then in charge of a jury at the Central Criminal Court, and was a contempt of court.

The respondent Griffiths contended that, as he was not responsible for the paragraphs complained of, he was not liable; if the court should hold him responsible, he apologized for the contempt. The other two respondents apologized to the court and expressed their regret to the court that they should have been parties to circulating matter which amounted to contempt, but they contended that, as innocent disseminators, they should not be held responsible.

The facts are more fully set out in the judgment of the court.

Sir Reginald Manningham-Buller Q.C., A.-G. and *Rodger Winn* in support of the motion. The issue of "Newsweek" in question was on sale after the trial at the Central Criminal Court had been proceeding for a considerable time and was still proceeding; the article complained of contained matter, highly prejudicial to the accused man, and as to some of which no evidence had been given either at the Central Criminal Court or in the justices' court; there can be no question but that it amounted to a contempt of court. In *Reg.* v. *Odhams Press Ltd.*[2] it was held that lack of intention or knowledge was no defence. Those who bring into this country and distribute matter published abroad which, if published here, would constitute contempt of court, are themselves guilty of contempt; otherwise, as Lord Erskine L.C. said in *Ex parte Jones*,[3] "the effect would "be, that the ends of justice would be defeated by contrivance." In *Rex* v. *Hutchinson*[4] distributors of a film were held guilty of contempt, but it matters not in what capacity those responsible for the distribution were acting; if they bring matter of this kind into the country and distribute it during a trial they are liable. In *Reg.* v. *Bryan*[5] McRuer C.J.H.C., committing to gaol for 10 days a Canadian distributor of magazines coming from the United States of America, said[6] that that "may be the only way we "can make distributors alert to their responsibility to refuse to "distribute magazines coming from abroad and containing offen-"sive articles of this character that tend to interfere with our "administration of justice," and[6]: "Even if he did not know "the contents of the magazines, the responsibility for their circu-"lation still remains on him. He received them directly from "abroad. If the local distributor is not to be held responsible "in such case I doubt if there is anyone within the jurisdiction "of this court that can be held responsible in the absence of an "appearance before the court of the foreign distributor or the "foreign publishers." Those observations are well founded and the contempt here is one for which those now before the court are responsible.

Neville Faulks for the respondent Griffiths. This respondent has been brought before the court on the grounds that he (1) published the words complained of, (2) caused them to be published, and (3) distributed the publication, but his answer is that he did none of those things; that answer raises questions of fact which, in the face of his affidavit, should be answered in his favour. Although his name appears after the word "editorial" in the magazine, the publication is written in American-English and that word does not mean "editorial" in the English sense, but "reportorial" and is used to distinguish his department from the other two independent departments into which "Newsweek" is divided, the advertising and circulation departments, which are quite separate and distinct. He did not attend the trial and he neither wrote the article complained of nor sent in the material for it.

---

[2] [1957] 1 Q.B. 73; [1956] 3 All E.R. 494.

[3] (1806) 13 Ves. 237, 239.

[4] [1936] W.N. 271; [1936] 2 All E.R. 514.

[5] [1954] 3 D.L.R. 631, 639.

[6] Ibid. 640.

[Lord Goddard C.J. Who in this country is the person responsible for "Newsweek" and for its conduct in this country?]

The respondent Griffiths clearly is not. The position is as though the editor of an English newspaper had written an article upon current events in America and it was there sought to attach the Washington correspondent of the English newspaper.

[Lord Goddard C.J. Then this magazine could publish anything that its editors liked and no one would be responsible.]

Although the respondent Griffiths is the senior employee of "Newsweek" in this country he should not be held responsible for the misdeeds of his employers; it might be expedient to hold him responsible but it would not be justice. The principle of the vicarious liability of an editor should not be extended to the foreign correspondent working in this country of a newspaper published abroad.

[The respondent Griffiths then gave evidence as to his position and his duties with "Newsweek."]

W. P. Grieve for Rolls House Publishing Company Ltd. and their circulation director. In the case of defamation a secondary publisher is not liable unless he knew or was negligent in not knowing of the objectionable contents of the publication: *Emmens* v. *Pottle.*[7] The position is the same in the case of contempt of court, and, although lack of mens rea and knowledge affords no answer to the person printing or publishing the contempt, the secondary publisher is not liable unless he had knowledge or was negligent. Rolls House Publishing Company Ltd. have distributed "Newsweek" for a number of years without receiving any complaint as to its contents; had there been anything to put them on their guard, there would have been a duty to make sure that the magazine was safe to circulate, but until they had notice or were put on guard they were under no duty to examine the contents: see *McLeod* v. *St. Aubyn.*[8] *Rex* v. *Hutchinson*[9] and *Reg.* v. *Bryan*[10] should be distinguished in this respect.

[Lord Goddard C.J. You are praying in aid the doctrine of innocent dissemination?]

Yes.

---

[7] (1885) 16 Q.B.D. 354; 2 T.L.R. 115.

[8] [1899] A.C. 549; 15 T.L.R. 487.

[9] [1936] W.N. 271; [1936] 2 All E.R. 1514.

[10] [1954] 3 D.L.R. 631.

[LORD GODDARD C.J. It may be that an occurrence such as this is one of the risks of a newspaper distributor's trade, and it may be put against you that in the case of a paper coming from a foreign country and in view of the world-wide interest aroused by the trial the distributors should have taken steps to see what the magazine contained.]

There would be no such duty unless there was something in their previous dealings with "Newsweek" which ought to have put these respondents on their guard. Sensational trials frequently take place; if the burden of inspecting all newspapers which they handle is to be put on distributors, it would be a task impossible of fulfilment. In the case of defamation it has been held that there is no duty on distributors to examine publications before distribution: *Weldon* v. *"The Times" Book Co. Ltd.*[11] and *Bottomley* v. *F. W. Woolworth & Co. Ltd.*[12]; and see also *Mallon* v. *W. H. Smith & Co. Ltd.*,[13] where the type of publication was such as to put anyone on their guard. The principles applicable to libel and contempt of court are the same: *Roach* v. *Garvan* (*St. James's Evening Post*)[14]; if anything, the court should lean more in favour of the persons accused in cases of contempt of court, which is a criminal matter, than of the publisher in a civil case of defamation. To hold distributors liable for a contempt of court is a very strong step. If Rolls House Publishing Company Ltd. are liable in this case, so also are a great number of wholesalers and retailers, for logically there can be no distinction between a large and a small scale distributor.

Gerald Gardiner Q.C. and *Helenus Milmo* for W. H. Smith & Son Ltd. In *Rex* v. *Hutchinson*[15] respondents described as film distributors were held responsible for contempt of court, but film distributors are in a very different position from book distributors. Neither in that case nor in *Reg.* v. *Bryan*,[16] where the publications were of an appalling nature, could it have been argued that the distributors were innocent disseminators. The ground of the decision in *Emmens* v. *Pottle*[17] was that it would be unreasonable and unjust if a person entitled to carry on the trade of retailing books were liable for a libel of which he had no knowledge when his lack of knowledge was not the result of negligence. That principle applies here, and the questions whether there was lack of knowledge or negligence are questions of fact. The respondent company did not know of the contents of this article, and there was no reason why they should have foreseen that a publication which had commented on cases of outstanding interest for 21 years in a proper manner would publish improper comment; on the facts no jury would hold them guilty of negligence in not knowing. They cannot be held guilty of negligence in this respect merely because the publication was foreign, and the question for the court, therefore, is whether it is reasonable to hold that they should have known that this issue of "Newsweek" would contain improper comment.

---

[11] (1911) 28 T.L.R. 143.

[12] (1932) 48 T.L.R. 521; [1932] W.N. 115.

[13] (1893) 9 T.L.R. 621.

[14] (1742) 2 Atk. 469.

[15] [1936] W.N. 271; [1936] 2 All E.R. 1514.

[16] [1954] 3 D.L.R. 631.

[17] 16 Q.B.D. 354.

[LORD GODDARD C.J. Might not different considerations apply to large scale distributors? Newsvendors, for example, might be lulled into a feeling of security by the knowledge that a large and well-known organization sold this publication.]

These respondents are not responsible for the magazine being in this country, nor are they the main distributors. If there is any main distributor or publisher, then it is the importers, and these respondents are in exactly the same position as all the other newsvendors and bookstall owners in the country. If an ordinary newsvendor had to read through every newspaper before he sold it, no morning paper would ever be available. Reliance is placed on the observations of Cave J. in *Mallon* v. *W. H. Smith & Son Ltd.*[18] and on *Bottomley* v. *F. W. Woolworth & Co. Ltd.*[19]

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. In *Sun Life Assurance Company of Canada* v. *W. H. Smith & Son Ltd.*[20] it was said that the test to be applied was (1) whether the defendant knew, and (2) whether he ought to have known if he had carried on his business properly. On that basis, had the magazine been published in this country the printers and publishers would have been liable. [Reference was made to *Reg.* v. *Odhams Press Ltd.*[21]] Where, as here, there is a foreign publication of this sort and there is no printer or publisher in this country who can be held responsible, then, if the importers and distributors are not liable, it would be difficult to secure that a sensational trial would not be prejudiced. It may well be that there is a higher duty on those bringing in foreign publications than there is on distributors of matter printed and published in this country. In *Bottomley* v. *F. W. Woolworth & Co. Ltd.*[22] it was said that all the circumstances had to be regarded, and it is no answer to say that a particular publication has been dealt with for a long time without complaint, for that is only one of the circumstances to be taken into account. Distributors must keep their eye on what is happening, and the fact that a trial is receiving publicity throughout the world is sufficient to impose on them a duty to see that publications containing improper comment are not circulated. In the circumstances of this case any person who gave any thought to the matter would have realized that the magazine would contain comment on the trial; if there is comment, then there is a duty to see that it is not of an improper character. In the case of contempt of court, where the liberty and perhaps the life of the subject is concerned, the duty to prevent the circulation of objectionable matter is higher than it is in the case of a libel on a private individual.

---

[18] 9 T.L.R. 621, 622.

[19] 48 T.L.R. 521; [1932] W.N. 115.

[20] (1933) 150 L.T. 211, 214.

[21] [1957] 1 Q.B. 73.

[22] 48 T.L.R. 521.

The case against the respondent Griffiths is put on the basis that he was part of the team of editors. Although he had no control over the selection of what was published, he was the person who in the normal way supplied the material from which the selection was made. He would not include in the material which he supplied anything which might be a contempt of court, but when, as here, he did not send the material himself but arranged that his principals should rely upon press cuttings and other sources, he was still under a duty to see that no improper matter was included.

Cur. adv. vult.

May 10. LORD GODDARD C.J. read the following judgment of the court. On March 18 this year the trial of Doctor John Bodkin Adams for murder began at the Central Criminal Court before Devlin J. and was continuing on April 4. On this latter date there was on sale on bookstalls in London an issue dated April 1 of a magazine called "Newsweek." In that part of it devoted to news from Great Britain there appeared two fairly long paragraphs, one headed "The doctor on trial" and the other "Bequests." These paragraphs both related to the trial and contained matter highly prejudicial to the accused man which had not been and never was given in evidence at the trial. It has not been contended by any of the respondents that this publication did not amount to a contempt, and in the opinion of this court it was one of the most serious description. Accordingly, the Attorney-General has moved for writs of attachment to issue against the respondents, the first of whom, Eldon Wylie Griffiths, is described as the chief European correspondent in London of the magazine; the respondent Rutherford is the circulation director of the Rolls House Publishing Company Ltd., who import it and distribute it to the trade, and W. H. Smith & Son Ltd. are well known newsagents and bookstall proprietors who also supply it to wholesale houses and have it on sale in their shops and bookstalls. It appears that the Rolls House Company distribute some 9,000 copies weekly, and W. H. Smith & Son dispose of about 1,800. It is only right to say at once that as soon as the attention of these two companies was called to the objectionable paragraphs they took every possible step they could to call in the copies which had been distributed to the trade and to stop the sale, not only of this particular issue, but also that of the next week in case it contained other objectionable matter, as the trial had not finished. They at once expressed deep regret that they should have been parties to circulating matter which amounted to a contempt—for which they apologized. Before dealing with their responsibility in the matter we will consider the position of the first respondent, who, as we have said, is described in the magazine itself as the chief European correspondent.

"Newsweek" is owned by a company registered in Dayton, Ohio, in the United States of America. The company has an office in New York, and it appears that it is in that city that the magazine is compiled and edited. It publishes two international editions, one for Asia and the other for Europe, and the circulation manager of this European edition is said to be resident in Paris. The company maintains offices in several European cities, and in this country it has one in Jermyn Street. The respondent Griffiths appears to be the head of that office, and, as we have said, is named in the paper as its chief European correspondent. The European edition is printed in Amsterdam, whence copies for sale in England and Scotland are dispatched by air to and distributed by or under the direction of the Rolls House Company without the intervention of "Newsweek's" London office. The respondent Griffiths has sworn that he takes no part in the preparation of the magazine; his duties are, so he says, merely those of a reporter. He collects items of news in this country and sends them by cable to New York, and there it is decided what, if any, use is to be made of them; the stories are written there and apparently the European edition is made up in New York and then sent for printing to Amsterdam. He said that he knows nothing of the contents till he sees the copy which arrives in this country. He does write stories based on information that he collects here and sends them to America for publication, but he has sworn that he did not write the offending paragraphs or send the material on which they were based. When seen on April 5 by Detective Superintendent Mannings with regard to the publication, he said: "I am surprised you "did not come to see me first, and I would like to know exactly "what the judge objects to in our article; further, why Smiths "and the Rolls Publishing Company took it upon themselves to "stop circulation of our magazine without notifying us. Did "they do it because you told them to, or did they do it of their "own volition?" He also told the officer that there was no one senior to him in the organization here, and that he was directly responsible to New York. In a statement he then signed he said it was his duty to offer guidance to the editors on stories pertaining to Britain. If he really did not know why those paragraphs relating to the trial were objectionable and offended against the law of this country he would seem to be singularly ill-qualified to offer guidance to the editors on matters relating to this country; it is safe to say that there is not a newspaperman in Great Britain who would not have seen at a glance that these paragraphs were objectionable in the highest degree and would expose those responsible for them to the risk of severe punishment.

But strongly as we deprecate the attitude he then adopted, and while we consider his evidence was far from frank, the question is whether we can hold that he is responsible for the publication of the offending matter. He has exhibited to his affidavit the cables he sent to New York relating to this trial, the authenticity of which was not challenged by the Attorney-General. It seems that he told his head office he was unable to send a reporter to the court and suggested that they should either write something in New York or find a freelance journalist to cover the trial (cable March 15). On March 19 he suggested that the English and probably many American papers were flooded with accounts of the trial so that as the London office was not attending the trial they could add nothing to what his principals could obtain in New York by cuttings from their newspapers. I may say in parenthesis that I am doing my best to paraphrase the rather obscure journalistic wording of the cables used, no doubt for brevity. On the same day he asked for any special instructions, and apparently he did receive some requests from New York for photographs. On March 26 he reported a declining interest in the trial as he thought reports were being curtailed in the expectation that the interest would revive if and when the accused gave evidence, and said they would try to find a fresh angle during the hearing on Wednesday, which in fact was the 27th. Whether he found one or not he did not tell us, but again on the 27th his principals cabled that they were "skipping" Adams, and apparently at least for the time being they were taking no further interest in the case. These cables do appear to support his evidence that he neither wrote the paragraphs nor supplied the information for them. We have already said that we do not think that he was wholly frank in the evidence he gave; his counsel called him at the hearing, but he added practically nothing to the contents of his affidavit. He apparently made no attempt to find out from New York from whom or by what means they obtained information as to matters which were not given in evidence at the trial and which for all that is known may be as untrue as they certainly were prejudicial. He had been in communication with his head office, as he told the superintendent that after conferring with New York he was authorized to state that the intention of the editors was accurately and impartially to tell the story of the trial. We can only say their performance seems lamentably inconsistent with their intentions.

In this state of the evidence it does not seem to the court that responsibility for this article or for its publication can be imposed on the respondent Griffiths. The offence is not the mere preparation of the article, but the publication of it during the proceedings. It seems the article was written in America, printed in Amsterdam and distributed by commercial houses in this country. It has never yet been held that a reporter who supplied objectionable matter to his editor or employer which the latter published is himself guilty of contempt. This respondent seems to be the representative of the magazine in this country, but that is not enough. While this jurisdiction to punish for improper comment on pending proceedings is absolutely necessary for the proper and impartial administration of justice, it is one which must be used with caution, and ought not to be vicariously extended because the real offenders are outside the jurisdiction.

We now turn to the case of the other two respondents—who were admittedly distributors of this publication. Their answer to the motion is that they did not in fact know that it contained offending paragraphs and had no reason to suppose that it would. The Rolls House Company have been distributing this magazine

1957

REGINA
v.
GRIFFITHS.
Ex parte
ATTORNEY-
GENERAL.

in Great Britain since 1949, with one short interval, and no complaint has ever been received as to its contents during that time. The system adopted is that it is sent by air from Amsterdam where it is printed, some copies being flown direct to Scotland, the rest to London Airport. Copies are put on sale at the airport directly they arrive and the rest sent to the London office, and so it is on sale before the company have any knowledge of its contents. The chairman of W. H. Smith & Son Ltd. has informed the court that before the company began to sell "Newsweek" the directors examined three consecutive numbers and came to the conclusion that it was unlikely that objectionable matter would be contained in it. He says that they have distributed it for some 20 years and have never received any complaint as to the contents. Accordingly, both these respondents, neither of whom is "the first publisher," seek to take advantage of what in the law of defamation is called the defence of innocent dissemination, based on the decision of the Court of Appeal in *Emmens* v. *Pottle*.[1] They rely also on *McLeod* v. *St. Aubyn*,[2] which was a case relating to contempt. In our opinion the latter case has no real bearing on the present. The facts were that the appellant had received by post a copy of a weekly newspaper which was generally current and on sale in St. Vincent. Before he had read it a friend of his found that the paper had not arrived at the public library where he usually read it and borrowed the appellant's copy. The Judicial Committee declined to hold that there was any duty on the appellant to have read his copy before he lent it to his friend. They clearly regarded the contention that in such circumstances the appellant could be said to be guilty of publishing a contempt as extravagant, and we should take the same view if, for example, an English reader happened to lend his copy of "Newsweek" to another.

In the present case the respondents were dealing with the magazine as a matter of business and distributing it as wholesalers to the trade; and also in W. H. Smith & Son's case selling it on their own bookstalls. It is true that in *Emmens* v. *Pottle*[3] the defendant was a newsagent who sold the paper in the ordinary course of his business, and the decision turned entirely on the particular facts found by the jury which the court held amounted to a finding that the defendant had not published a libel. We cannot agree that that case is conclusive of the present. Cases of contempt by the publication of matter tending to prejudice a fair trial stand in a class of their own and are not truly analogous to cases of defamation. This court lately reviewed the decisions on this subject in *Reg.* v. *Odhams Press Ltd.*,[4] and held that lack of knowledge of the contents of the offending article was no defence, nor was lack of intention. This had been distinctly held both by Lord Hardwicke L.C. and Lord Erskine L.C. in the clearest terms in the cases we cited in our judgment[5] and which we need not set out again, and it is to be observed that they were both dealing with persons who innocently printed the matter complained of in the ordinary course of their trade. As we are holding that to those who in the way of their trade are responsible for putting the offending matter into circulation the defence of innocent dissemination is not available in cases of contempt, it is unnecessary to consider whether either of these respondents was guilty of any negligence, though having regard to what may be called the gossipy nature of this magazine and the wide interest that was evoked by the trial in question, and the notorious fact that the restraint which English law imposes on comment on trials in progress is not imposed in America, it may well be that the concluding sentence of the judgment of Bowen L.J. in *Emmens* v. *Pottle*[6] would apply here.

---

[1] (1885) 16 Q.B.D. 354; 2 T.L.R. 115.

[2] [1899] A.C. 549; 15 T.L.R. 487.

[3] 16 Q.B.D. 354.

We accept unreservedly that neither of these respondents (we treat the respondent Rutherford and the Rolls House Company as one) knew of these scandalous paragraphs, and we recognize that they immediately took every step in their power to stop the circulation as soon as their attention was directed to the matter. It is regrettable that in holding them guilty of a contempt we cannot also deal with those who are far more responsible but are out of the jurisdiction. We shall impose a fine (albeit of a nominal amount) and we do so to emphasize the risk which is run by dealing in foreign publications imported here but which have no responsible editor or manager in this country. The distributors are the only persons who can in these circumstances be made amenable in the courts of this country. Now that the risk and responsibility have been exposed by this case, should offences occur in the future similar leniency may not be extended. It was argued that if these two respondents are liable so every small newsagent or street seller who sells the paper would equally be liable. Logically this may be so, but the court would not regard with favour applications against such persons to whom no real blame would attach. This jurisdiction is discretionary and the court can be trusted not to exercise it except against those who can fairly be said to bear some real responsibility for the publication.

---

[4] [1957] 1 Q.B. 73; [1956] 2 All E.R. 494.

[5] *Roach* v. *Garvan* (1742) 2 Atk. 469, and *Ex parte Jones* (1806) 13 Ves. 237.

[6] 16 Q.B.D. 354, 358.

The order of the court will be that the respondents W. H. Smith & Son Ltd. and Rolls House Publishing Company Ltd. each pay to the Crown a fine of £50 within seven days or writs will issue, and they will each pay one half of the taxed costs. There is no need to make a separate order against the respondent Rutherford.

Order accordingly.

Solicitors: *Director of Public Prosecutions; Crane & Hawkins; Lawrence Jones & Co.; Bircham & Co.*

J. F. L.

SCENE ESTATE LTD. *v.* AMOS.

[1955 S. No. 3546.]

C. A.

1957
April 4, 5.

Denning, Parker and Sellers L.JJ.

Agriculture — Agricultural holding — Tenancy — Protection—Letting of land for mowing and grazing for period of three months — Subsequent extensions, by new agreements, for like periods — Claim by landlords for possession — Contemplation of parties — Whether let during some specified period of the year — Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 2 (1), *proviso.*

Landlords by an agreement in writing let pasture land to a tenant for grazing purposes only, for a period of three months, and subsequently, by letters, extended the letting for further periods, each of three months. After several years the landlords gave notice to the tenant terminating the letting and brought proceedings to recover possession of the land. At the time of the agreement both parties thought that it would be extended for periods exceeding a year in aggregate, although nothing was said between them on the matter. The landlords contended that the agreement fell within the proviso to section 2 (1) of the Agricultural Holdings Act, 1948, as one "made (whether or not the agreement expressly so provides) "in contemplation of the use of the land only for grazing or "mowing during some specified period of the year," and that the tenant was not therefore entitled to the benefit of the Act:—

Held, that in the case of a genuine written agreement it was not permissible to look outside it except to ascertain terms on which it was silent; in the ordinary way the courts, in ascertaining the "contemplation" of the parties within the meaning of the section should be guided by the terms of the agreement, express or implied, and by nothing else. Accordingly, in the present case the agreements must be looked upon as successive arrangements for grazing for three months, one period of three months following another, and each arrangement came within the proviso and was not protected by the Act.

Per Parker L.J. "Specified period of the year" is equivalent to "specified part of the year" (*Reid* v. *Dawson* [1955] 1 Q.B. 214; [1954] 3 All E.R. 498). The word "only" must apply not only to the use but to the period.

Decision of Hallett J. affirmed.

APPEAL from Hallett J.

On January 20, 1950, an agreement was drawn up and signed whereby Scene Estate Ltd., the owners of an old golf course in Kent, agreed to let and the defendant John Reuben Amos, a neighbouring farmer, agreed "to take the right to use for "grazing purposes only, and not otherwise, all those fields, "meadow or pasture land . . . known as the Hythe golf course "in the parish of Hythe . . . for the period of three months from "the date of this agreement." At the time of the agreement both parties thought that, at the end of the three months, it would be renewed, but the landowners, wishing to retain the power to get possession when they so desired, and to avoid being caught by section 2 (1) of the Agricultural Holdings Act, 1948,[1] sent to the tenant just before the end of each three months a letter giving to the tenant an extension for another three months. These extensions continued until 1955, when the landlords gave notice to the tenant to terminate the tenancy. The landlords relied on the proviso to section 2 (1). For the tenant it was contended that when the agreement was made the parties contemplated that the letting would continue for at least a year and therefore the proviso did not apply.

---

[1] Agricultural Holdings Act, 1948, s. 2 (1): "Subject to the provisions "of this section, where under an "agreement . . . any land is let to a "person for use as agricultural land "for an interest less than a tenancy "from year to year, or a person is "granted a licence to occupy land for "use as agricultural land, and the "circumstances are such that if his "interest were a tenancy from year "to year he would in respect of that "land be the tenant of an agricul"tural holding, then, unless the let"ting or grant was approved by the "Minister before the agreement was "entered into, the agreement shall "take effect, with the necessary modi"fications, as if it were an agreement "for the letting of the land for a "tenancy from year to year: Pro"vided that this subsection shall not "have effect in relation to an agree"ment for the letting of land, or the "granting of a licence to occupy land, "made (whether or not the agree"ment expressly so provides) in con"templation of the use of the land "only for grazing or mowing during "some specified period of the year. ". . ."

Hallett J., on December 21, 1956, granted an order for possession and mesne profits to the landlords. The tenant appealed.

R. E. Megarry Q.C. and *Ian Percival* for the tenant. The only question is whether an order for possession and mesne profits has been rightly granted to the landlord under the proviso to section 2 (1) of the Agricultural Holdings Act, 1948. *Reid* v. *Dawson* [2] is the only reported case in which the point now under consideration was considered, but it was there decided on different facts. If agricultural land is let for three months under an agreement or on a licence for less than a year it would apparently be deemed to be a tenancy from year to year, unless it be taken out of the Act by the proviso to section 2 (1). The present case depends mainly on the interpretation of the word "contemplation" in the proviso. The landlords must show that the agreement was made in contemplation of the land being used only for grazing or mowing for some "specified period of the "year." The tenant says that it was not made in contemplation of any particular use or any specified period, and the court must look to see what was in contemplation in the minds of the parties when the agreement was made. It was then admittedly thought that the tenant would have the use of the land for more than a year, and there is no evidence that the letting was for a specified period of the year. [*Wolfe* v. *Hogan* [3] and *In the Estate of Langston, decd.*[4] were also referred to.]

J. Scott Henderson Q.C. and *Stewart L. Newcombe* for the landlords were not called upon for argument.

DENNING L.J. This case concerns an old golf course near Hythe. It is owned by Scene Estate Ltd. They allowed a farmer, John Reuben Amos, to have some 150 acres for the purposes of his putting some of his cattle on it. The company want to terminate the arrangement with him, but he says that under the Agricultural Holdings Act he is entitled to remain there.

---

[2] [1955] 1 Q.B. 214; [1954] 3 All E.R. 498.

[3] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

[4] [1953] P. 100; [1953] 1 All E.R. 928.

It is well known that since 1948 a tenant of agricultural land is in a strong position: he can stay in occupation for life unless the owner gets the Minister's consent or fulfils some other statutory provision enabling him to evict the tenant. The whole question in this case is whether the arrangement which took place was such as to entitle the defendant to the benefit of the Act. This depends on section 2 (1) of the Act, which we have already considered in *Reid* v. *Dawson*.[1] Under that subsection any agreement for a tenancy of agricultural land, even for less than a year, or a licence to occupy agricultural land for less than a year, does give rise to a right to remain indefinitely, except that there is a proviso which states that the subsection shall not apply (and these are the important words) "in relation to an agreement for the letting of land, or the granting of a licence to occupy land, made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year." We have to consider whether the agreement in this case comes within that proviso.

Now let me state the history of this matter. This golf course had been requisitioned during the war and it was bought by Scene Estate Ltd. in 1947. The defendant was a neighbouring farmer, and he was very anxious to be allowed to put his cattle on the land. But Scene Estate Ltd. did not want to let him have it on a tenancy which would become indefinite and almost permanent under the Agricultural Holdings Act, so they inquired of their lawyers whether there was a way in which they could let him have the land for grazing but still not tie it up in his hands for his life. The defendant, who wanted to get the grazing, was ready to agree to any legal arrangement to that end, because he knew that he would not get the grazing unless he entered into an agreement which enabled the landlords to get possession when they desired. What the lawyers advised, and the arrangement that was made, was this: on January 20, 1950, an agreement was drawn up and signed whereby the owners agreed to let, and the defendant agreed "to take the right to use for grazing purposes only and not otherwise all those fields, meadow or pastureland . . . known as the Hythe golf course in the parish of Hythe in the County of Kent for the period of three months from the date of this agreement." So they let him this land—for grazing purposes only—for a period of three months.

---

[1] [1955] 1 Q.B. 214; [1954] 3 All E.R. 498.

Just looking at that agreement by itself, it is quite plain that it was expressly within the proviso and leaves the owner free to regain his land at the end of the three months. But now comes the difficulty: at the time when the agreement was made both parties thought that, at the end of the three months, it would be renewed, and that there would be a renewal every three months. Indeed, the tenant did quite a lot of work to the fencing to keep his cattle in, and he would not have done it unless he thought that the agreement would be renewed every three months. In order to avoid being caught by the Act, the lawyers seem to have advised the owners in this way: "Just "before the three months are up, write a letter giving the "tenant a renewal, or extension, if you please, for another three "months." That is what was done. Every three months a letter was written. I take one at random. On January 8, 1952, for instance, after the arrangement had been running for many months, Col. Butler, the agent of the owners, wrote to the defendant: "With reference to your extended grazing tenancy "held under an agreement dated January 20, 1950, the eighth "extension of which expires on the 19th inst., I am authorized "to inform you that upon payment of a sum of £27 0s. 9d. you "may reoccupy the said land for a further period of three months "commencing January 20, on the same terms and conditions "as are stated in the aforesaid agreement, except that the date of "termination of the tenancy shall now be April 19, upon which "date all stock shall be removed from the said land, and posses- "sion of the land given up."

So what happened was this: just before the end of every three months a letter was written saying that on payment of the specified amount the tenant could re-occupy the land for a further three months. He paid, and received extension after extension. In 1954 another agreement was drawn up, in which the acreage was altered and the amount of rent varied accordingly: but otherwise the same as before. It went on up to 1955. There were 21 of these extensions, one every three months.

Let me first dispose of an argument which has been put forward by Mr. Percival. It seems to be reasonably plain that this was not one continuous letting but a series of successive lettings to the defendant. In the beginning there was a letting of three months' grazing. Then there was a letting of the next three months' grazing. This continued—every three months there was a new agreement—and each agreement was on the face of

C. A.
1957

SCENE ESTATE LTD. v. AMOS.

Denning L.J.

it within the proviso: so that the defendant apparently did not get the benefit of the Act.

When the defendant first went to lawyers they told him that he had no right to remain. Then he took further advice and some other lawyers told him that there was a good argument that he was protected under the Act, and so eventually the case comes to this court. Mr. Megarry relies on the words in the proviso, "made (whether or not the agreement expressly so provides) in "contemplation of the use of the land only for grazing or "mowing during some specified period of the year." Pointing to the word "contemplation," he says that the courts are not concerned with what the parties have said in the formal documents or even said outwardly one to the other. He says that the contemplation of the parties can be discovered by looking inside their minds, and that on the evidence here both sides contemplated that the arrangement would continue for at least a year and probably longer: and that therefore the defendant was protected.

So far as the facts are concerned, the judge summarized the evidence very fairly in these words: "Col. Butler"—he is the agent for the owners—"whose evidence was in some respects "vague, but in all respects notably candid, told me that he "himself expected and assumed that the defendant would "continue in occupation of the land for more than three months, "certainly one year, perhaps two, because he thought that the "land would not be required by the plaintiffs for any other "purpose for a year or more, but he said that this was only his "own assumption and that he never communicated it to the "defendant. The defendant himself conceded, in answer to his "own counsel, that he did not remember Col. Butler saying any"thing to him about extensions, but he also no doubt expected "and assumed that he would be able to remain in possession of "the land for longer than three months for the same reason as "that stated by Col. Butler. He did not suggest that there was "ever any sort of agreement that his tenancy would be renewed "from time to time, and I feel quite sure that he can never "have had any hope of obtaining such an agreement from the "plaintiffs."

In other words, each party had it at the back of his mind that the agreement would be renewed from time to time every three months, but each kept it to himself and did not actually make a stipulation about it. It was just an expectation. It is argued before us that, on that finding and on the evidence (which I need not go through because the judge has summarized it sufficiently), it was in the contemplation of both parties that the agreement would extend for a long time, not merely for three months or a specified period of the year but much longer, and that therefore the defendant was protected in his occupation.

I do not think that the word " contemplation " in the proviso should be given the meaning which Mr. Megarry seeks to put upon it. In my opinion the object of the word " contemplation " in the proviso is to protect a landlord who has not expressly inserted a provision that it is for grazing only, or for mowing only, or that it is for a specified part of a year; but, nevertheless, both parties know that that is what is contemplated. Often a landlord may let a field to a man by word of mouth, saying: " You can " have the field this year the same as you had it last year." Both sides mean it to be for grazing only and mean it to be only for a few weeks of the spring, but they do not say so expressly. In such circumstances, even though nothing is expressed in the agreement, nevertheless the landlord can still take advantage of the proviso. That seems to me to be the real object of introducing the " contemplation " of the parties. It would also cover the case of a " sham " agreement. Suppose, for instance, the written agreement did not really represent the true transaction. The parties might contemplate the use of the land for ploughing up, but falsely describe it as for grazing; or they might contemplate a letting for two years and falsely put in three months. A sham agreement of that kind would not come within the proviso, because, despite the express words, the parties intended a different state of affairs. It seems to me that those are the two cases which the legislature had in mind: and I find it difficult to visualize any other. Apart from those cases, the courts should be guided by the terms of the agreement, express or implied, and by nothing else: for in the ordinary way it is from those terms alone that the contemplation of the parties can be gathered.

On the findings of the judge, I think that this is a case where the contemplation of the parties can only be gathered from the documents which passed between them. I look upon the agreements (as the judge did) as being successive arrangements for grazing for three months, one period of three months following another, a new arrangement each time. Each one of those arrangements comes within the proviso to the subsection and is not caught by the Act. The proviso in the Act was inserted in favour of landlords, and here we find a tenant seeking to divert it to his own purposes. I do not think that he should be allowed to do so. The tenant fully understood all the time that he was not to be protected by the Act, and he is not protected. I agree with the judge and would dismiss the appeal.

Parker L.J. I agree. Section 2 (1) of the Agricultural Holdings Act, 1948, applies the provisions of that Act to agreements " for the letting of land, or the grant of a licence to occupy " land " (which is agricultural land) where the period of letting or licence is for only part of the year. In doing so, Parliament has overcome the difficulty which arose as a result of the decision in *Land Settlement Association* v. *Carr.*[2] A landlord is, however, able to let or license the use of agricultural land without bringing himself within the Act if he can show that the conditions of the proviso are fulfilled. Quite clearly the onus is upon him, the landlord, to satisfy the court that the agreement in question was " made (whether or not the agreement expressly so provides) in " contemplation of the use of the land only for grazing or mowing " during some specified period of the year."

The words are not altogether easy to construe, but this at any rate, I think, is clear: first, that " specified period of the year " is equivalent to " specified part of the year "—that, I think, is the effect of the decision of this court in *Reid* v. *Dawson*[3] in 1955; secondly, that the " contemplation " must be not only that the use of the land shall be only for grazing or mowing but that the period of use shall be only a period which is less than a year. It seems to me that, as a matter of grammar and ordinary reading, the word " only " must apply not only to the use but to the period; and indeed, if it were not so, it seems to me that the words " some specified period of the year " were quite unnecessary, because this is a proviso to a section which is only dealing with tenancies which are for part of a year. Thirdly, it seems to me that the " contemplation " must be mutual, both on the part of the landlord and of the tenant. Fourthly, that one judges the contemplation as at the beginning of the agreement, if there is but one agreement, or, if (as here) there is a succession of agreements, then at the beginning of each agreement; because unless the landlord satisfies the court that the required

---

[2] [1944] 1 K.B. 657; 60 T.L.R. 488; [1944] 2 All E.R. 126.

[3] [1955] 1 Q.B. 214.

"contemplation" exists in respect of each, then from the time of the agreement in respect of which he fails to show the necessary contemplation the provisions of the Act will apply. Lastly, it seems to me clear, by reason of the words in brackets—"whether or not the agreement expressly so provides"—that it is permissible, in certain cases at any rate, to go outside the agreement and see what the "contemplation" was from extrinsic evidence.

Difficult questions remain as to what is meant by "contemplation" and as to the exact circumstances in which one can look at extrinsic evidence. A landlord may (as here) desire to be in a position to develop at some indefinite future date land which is agricultural land. Accordingly, he lets the land expressly for mowing and expressly for a period which is short of a year. That is the only obligation in the agreement. But at the same time he does not expect to be able to develop it for, say, a year or two, and he expects that his tenant will be allowed to remain on; and the tenant has the same understanding. The question then is: is the original agreement made in contemplation of use for mowing and grazing for three months, or is it made in contemplation of use for mowing and grazing for one or two years? For myself, I think that the words "made in contemplation of" are stronger than "made in expectation of."

Prima facie it seems to me that an agreement is not made in contemplation of something being done under it unless there is power and obligation to do that very thing. There is no power in the tenant to stay for more than three months and no obligation in the landlord to allow him to do so. Beyond three months the matter is purely a matter of expectation. But if that is so, what (it is said) is the effect of the words in brackets, "whether or not the agreement expressly so provides"? In my judgment, those words do not require a different construction. They are apt, and perfectly apt, to enable one to look outside the agreement or the licence in order to ascertain the terms where the agreement is silent on it. If the agreement is express on the subject, then I do not think that one is entitled to look beyond it unless it is for the purpose of showing that the agreement is a complete sham. In other words, in the case of a genuine agreement which expressly says that the lease is for grazing or mowing only, and expressly says that the period is a period of less than a year, there is no right, in my view, to look beyond the agreement itself. For those reasons I would dismiss this appeal.

C. A.
1957

SCENE ESTATE LTD. *v.* AMOS.

SELLERS L.J. I, too, agree that this appeal should be dismissed, and would uphold the judgment of Hallett J. I so entirely agree with the reasoning of both my Lords in their judgments that I do not wish to add anything myself.

Appeal dismissed.

Solicitors: *Ranger, Burton & Frost for Girling, Wilson & Harvie, Canterbury; Arthur E. & C. Burton for Worthington-Edridge & Ennion, Folkestone.*

A. W. G.

C. A.

VILLA D'ESTE RESTAURANT LTD. *v.* BURTON.

1957
Feb. 8;
Mar. 13.

Lord Evershed M.R., Morris and Ormerod L.JJ.

Landlord and Tenant—Rent tribunal—Furnished premises—Rent registered—Increase of rent—Change of lessee—Contract of letting reserving approved rent—Application by lessors to tribunal for reconsideration—Rent increased—Whether lessee liable to pay increased rent—Jurisdiction of tribunal to effect statutory modification of contract—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *ss.* 2, 4.

After the rent of premises, to which the Furnished Houses (Rent Control) Act, 1946, applied, had been approved by a rent tribunal and registered, there was a change of lessee and a new contract of letting at the approved rent. The lessors referred the case to the tribunal for reconsideration of the rent and the tribunal increased the rent, but the lessee refused to pay the increase, except in so far as it related to an increase in the rates which he had contracted to pay:—

Held (Lord Evershed M.R. dissenting), that the powers of rent tribunals on a reference under section 2 (3) of the Act of 1946 [1] were to reconsider the rent entered in the register and to approve, reduce or to increase the rent payable under the contract. If the sum payable was increased, that increased amount was due under the contract as from the date specified by the tribunal. Accordingly, the lessee was liable to pay the increase.

Per Lord Evershed M.R. In such a case as the present it would have at least to be shown in order to sustain any claim for rent above that stated in the lease, by reference to clear language or necessary implication in the statute, that the Act of 1946 superseded the lease and the legal rights thereby created or ensuing.

---

[1] Furnished Houses (Rent Control) Act, 1946, s. 2 (3): "Where the "rent payable for any premises has "been entered in the register in "accordance with the provisions here-"inafter contained, it shall be lawful "for the lessor or the lessee or the "local authority to refer the case to "the tribunal for reconsideration of "the rent so entered on the ground "of change of circumstances and . . . "the tribunal shall have power to "increase the rent payable."

It is not so shown. Proper effect can be given to the terms of section 2 (3) without any implication of a provision for substituting the increased rent for the (lower) contractual rent.

APPEAL from Judge Bensley Wells sitting at Marylebone County Court.

In 1949 Villa D'Este Restaurant Ltd. demised premises known as Flat No. 4 at No. 1, Lancaster Gate, London, W.2, to a Mrs. Tettersall for a term of five years at a rent of £413 15s. 6d. The lessors provided certain services and as a result the letting was one to which the Furnished Houses (Rent Control) Act, 1946, applied and, as the premises were in a district in which the Act was in force, the contract was one which could be referred to the appropriate rent tribunal. On October 27, 1949, pursuant to an application by Mrs. Tettersall, the Paddington Rent Tribunal reduced the rent to £339. In 1952 the rent was reconsidered by the tribunal, the lessee being at that time a Mrs. J. Bentala, and was increased to £371 13s. 6d. In 1953 it was again increased to £393 9s. 0d. as from April 23, 1953, until the expiration of the Act. At that time Mrs. Bentala was still the lessee, but on September 28, 1954, the premises were demised to Kenneth George Burton for a term of five years from September 29, 1954. In addition to the rent (which by an error was 2s. in excess of the registered rent of £393 9s. 0d.) the lessee agreed to pay a sum equal to the amount by which the general and water rates should exceed those payable for the year 1954–1955. The lessors continued as before to provide services. On an application by the lessors for reconsideration of the rent, the tribunal increased the rent to £452 12s. 6d. as from December 21, 1955, until the expiration of the Act. That decision was notified to the parties to the contract and to the local authority, and on December 30, 1955, was entered in the register kept by the local authority. The lessors demanded rent at the increased rate as from December 21, 1955, but the lessee refused to pay on the ground that he was not obliged to pay any more than he had contracted to pay by the terms of his lease, though he did not allege that the date from which the demand was made was wrong. The lessors brought proceedings in the county court claiming £15 7s. 6d., being the amount underpaid if the increase was upheld. The county court judge gave judgment for the lessee and the lessors appealed. (In the judgments the lessors and the lessee are referred to as the appellants and the respondent respectively.)

Michael Sherrard for the lessors. The judge erred in holding that the tribunal had acted under section 2 (4) of the Act of 1946; the application was made under subsection (3).

[*J. T. Plume* for the lessee, intervening. It is conceded that the application was under subsection (3).]

The judge indicated that if he had been proceeding under subsection (3) he would have been in favour of the lessors' view. An application may be made under subsection (3) although the contract originally referred to the tribunal has come to an end and there has been a change of lessee. If an increase in the rent payable is directed by the tribunal, it will override conflicting terms of a continuing contract and will not be postponed until the contractual term comes to an end: see Megarry on the Rent Acts (1955), 8th ed., p. 461. *Bowness* v. *O'Dwyer*[2] shows that a reduction of rent pursuant to an application under section 2 (2) takes effect during the continuance of a contractual tenancy, and there is no good reason for holding that an increase made under the next subsection should not operate in the same way. "Rent "payable" in subsection (3) means the rent which is to be paid. That meaning is supported by section 12 (2). "The case" which the tribunal has to consider under subsection (3) means the registered rent; the tribunal is not asked to consider "the contract," as in subsection (2), or any contract. The effect of registration of rent as between parties other than those who were parties to the reference was considered in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Gormly.*[3] In section 2 (4) the word used is "chargeable," but even so it is submitted that the lessors would be entitled to claim an increase during the continuance of a contractual term under that subsection. The parties must be taken to have contracted on the basis of the Act of Parliament under which they both have rights. There is no case for saying that the sum "payable" has to be limited to the sum payable under a particular contract.

J. T. Plume for the lessee. Under section 2 (2) what is referred to the tribunal is "the contract," but under subsection (3) the tribunal is required to reconsider the registered rent, and there need be no contract of letting at the time when the application is made. An increase directed by the tribunal takes effect immediately, subject to the terms of the continuing contract, if any. That does not make the power of the tribunal under subsection (3) academic, for provision can be made in a lease reserving such rent as may be lawful from time to time. But no such provision was made here. "The rent payable" means the registered rent, but not necessarily the rent which must be paid under a subsisting contract. If that were so the parties would be unable to contract for payment of a rent less than the registered amount. The registered rent is merely a maximum, and a new ceiling can be fixed at any time by the tribunal.

---

[2] [1948] 2 K.B. 219; 64 T.L.R. 367; [1948] 2 All E.R. 181.

[3] [1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030.

[ORMEROD L.J. If that is correct, the people who eventually have to pay the increase will not necessarily be those who instituted the proceedings before the tribunal.]

Whatever construction of this provision is adopted it leads to anomalies. Parliament has made provision that on an initial application the terms of a contract can be disturbed one way only —that no increase can be made, and it would be strange if the terms of a contract should be alterable the other way on a second or subsequent application. There is clear prohibition against charging more than the registered rent, and any other interference with the sanctity of contract, if intended, could have been made equally clear: see the specific provision in section 40 of the Housing Repairs and Rents Act, 1954.

[MORRIS L.J. Does not this view involve giving a different meaning to "rent payable" at the beginning and the end of subsection (3)?]

Section 2 (1) and (2) deal with the original reference of a contract. The rent payable is then registered. The rent so registered is not referable to a particular contract exclusively, but is the rent which can be properly payable under any contract relating to those premises; the decision of the tribunal is a decision in rem. "The case" in subsection (3) refers to that rent. The reference in subsection (3) to subsection (2) is only to the machinery of that provision.

[LORD EVERSHED M.R. Non-payment of the rent as increased by the tribunal will not give rise to a right of forfeiture under a proviso for non-payment of "the rent hereby reserved," and section 146 of the Law of Property Act, 1925, would not seem to apply. Forfeiture clauses are construed strictly and it might be difficult in the absence of clear words to say that the rent as increased should be substituted for the rent reserved in the lease.]

Michael Sherrard in reply. It is incorrect to say that there need be no contract of letting where application is made under subsection (3). The use of the words "lessor" and "lessee" clearly envisages that there is a contract, although it need not,

C. A.

1957

Villa D'Este Restaurant Ltd. *v.* Burton.

of course, be under seal, nor need it be the contract which was the subject of the original application.

[Lord Evershed M.R. Where an application has been made under subsection (3) and a rent has been approved, what are the lessor's rights if he subsequently agrees to let the premises for less than the registered rent, in consideration, for example, of the tenant taking a long term? Can he notwithstanding that agreement demand the full registered amount?]

If the tenant refused to pay the excess over the amount agreed, the landlord could sue for the difference, but he would be liable to be met by a plea of estoppel. The distinction between that type of case and the present is that in the example there was a definite agreement for a lower rent. This argument was considered in *Bowness* v. *O'Dwyer.*[4] This Act interferes with the sanctity of contract, substituting the figure fixed by the tribunal whether it is higher or lower than the amount previously agreed by the parties.

The reference to subsection (2) in subsection (3) is not limited to the mere machinery of that provision. Subsection (3) extends the power of the tribunal on applications under that provision by enabling them to increase the rent, and then subsection (2) is to be read in, and that shows that an increase so made is to operate as the tribunal may direct.

Cur. adv. vult.

March 13. Lord Evershed M.R. I will ask Morris L.J. to read the first judgment.

Morris L.J. stated the facts and continued: The form of reference by the appellants to the tribunal is not before us. The respondent appears to have been represented by his solicitor at the hearing before the tribunal. If his present contention is correct, then the proceedings before the tribunal were a waste of time, for there could be no point in fixing an increased rent "from December 21, 1955," if no increase could be imposed, and if contractual terms due to cover the period down to September 29, 1959, could not be varied and if there was no question of any variation by agreement. No proceedings by way of certiorari have been taken. But it has not been submitted that there is any bar which prevents the respondent from presenting his argument.

The case raises, therefore, the question whether the tribunal had power to do what they did, and whether the effect and result of what they did was that the respondent became obliged in law to pay rent at the increased figure determined by the tribunal.

---

[4] [1948] 2 K.B. 219.

The county court judge has based his judgment upon the supposition that the matter was before the rent tribunal or was dealt with by the tribunal pursuant to the provisions of section 2 (4) of the Act of 1946. That subsection reads: "Where on any "reference of a contract, the rent whereunder includes payment "for services, the tribunal are of opinion that it would be proper "that the rent payable for the premises should include an "amount in respect of increase since September 3, 1939, in the "cost of providing such services, and are also of opinion that "in all the circumstances a rent higher than the rent payable "under the contract might properly be chargeable for the "premises in order to include an amount in respect of such "increase, they may approve a rent higher by not more than "such amount as they think reasonable in that respect."

The judgment of the judge was that section 2 (4) does not permit a landlord to impose an increase of rent under subsection (4) during the currency of an existing contract of tenancy: he accordingly rejected the plaintiffs' claim; but the judgment appears to proceed on the basis that the position would have been different had the application to the tribunal been under section 2 (3). Mr. Plume, for the respondent, has, however, very fairly stated and admitted that both parties understood that the application had been made under section 2 (3). The appeal was accordingly argued before us on that basis.

The duty of preparing a register and of keeping it up to date is imposed upon the local authority by section 3 (1) of the Act. Section 3 (2) is in the following terms: "The register shall be "so prepared and kept up to date as to contain, with regard "to any contract under which a rent is payable that has been "approved, reduced or increased under the last foregoing section "(being a contract relating to premises situated in the area of "the local authority), entries of—(*a*) the prescribed particulars "with regard to the contract; (*b*) a specification of the premises "to which the contract relates; and (*c*) the rent as approved, "reduced or increased by the tribunal, and, in a case in which "the approval, reduction or increase is limited to rent payable "in respect of a particular period, a specification of that period."

[His Lordship referred to the entries on the register relating to the references prior to 1954, noting that the register was called a "register of contracts referred to the tribunal." His Lordship continued:] It is provided by section 4 (1) of the Act as follows: "Where the rent payable for any premises is entered in the "register under the provisions of this Act, it shall not be lawful "to require or receive—(*a*) on account of rent for those premises "in respect of any period subsequent to the date of such entry, "(or, in a case in which a particular period is specified, in respect "of that period) payment of any sum in excess of the rent so "entered." At the time when the appellants, on September 28, 1954, granted a lease to the respondent the "rent payable" for Flat 4 was entered in the register. The entry was that which had been made on April 25, 1953. Accordingly, it was not lawful to require an amount of rent more than £393 9s. 0d. (The figure of 11s. in the lease rather than 9s. was doubtless a slip.)

The question now arises as to what is the result in law of the decision of the tribunal in December, 1955, which came about as the result of an application made by the appellants under section 2 (3).

That subsection begins with the words: "Where the rent "payable for any premises has been entered in the register in "accordance with the provisions hereinafter contained, it shall "be lawful for the lessor or the lessee or the local authority to "refer the case to the tribunal for reconsideration of the rent "so entered on the ground of change of circumstances." By the provisions of section 2 (1) the "lessor" and the "lessee" are defined. They may refer to the tribunal "a contract to "which this Act applies." The opening words of subsection (3) refer to entry in the register "In accordance with the provisions "hereinafter contained." That is a reference to section 3. If the requirements of section 3 are read into and carried into section 2 (3), then that subsection provides that where the rent payable for any premises has been entered in the register so as to contain with regard to any contract under which a rent is payable that has been approved, reduced or increased entries of the names and addresses of the parties to the contract referred to the tribunal (see [the Furnished Houses (Rent Control) Regulations, 1946 (S.R. & O., 1946, No. 781)] paragraph 2 of the Second Schedule of the "prescribed particulars"), then it is lawful for the lessor or the lessee to refer the case to the tribunal for reconsideration of the rent so entered on the ground of change of circumstances. What, then, is the "case"? One possible view is that, as the scheme of the Act is to refer contracts, the "case" that may be referred for reconsideration of the rent entered in the register is the case of a contract that has previously been referred. But in December, 1955, the contract between the appellants as "lessors" and the respondent as "lessee" had never been before the tribunal. The name of the "lessee" was not on the register. On this possible view, before there could be reconsideration of the rent entered in the register, there would have had to have been a prior reference of "the contract" between the parties, and not merely some prior reference of a different contract between other parties. This view would involve that after a new contract is made referable to premises where the rent payable for such premises is entered in the register there would have to be a reference of the new contract if only for the purpose of having the rent "approved," and that this would have to take place before the lessor could at some later date ask for an increase.

This might, however, involve a somewhat formal expedition to the tribunal. The parties do not submit any such view of the matter, and both parties are content to assume that the "case" which can be referred includes a contract which has not previously been before the tribunal provided that as a result of some earlier reference there is in the register an entry of "the "rent payable for" the premises.

It is therefore common ground between the parties that the application which the appellants made to the tribunal was a reference under section 2 (3), and that the application was properly made within the contemplation of that subsection. The "case" was referred to the tribunal for reconsideration, on the ground of change of circumstances, of the rent payable for the premises as entered in the register. In that situation the result is that the provisions of section 2 (2) "shall apply on any such "reference in like manner as they apply on a reference under "subsection (1) of this section subject to the modification that "the tribunal shall have power to increase the rent payable."

It becomes necessary, therefore, to see what are the provisions of section 2 (2) and to see the effect of the modification. One provision in subsection (2) is that the tribunal may make such inquiry as they think fit. They must give to each party (and in certain circumstances to a housing authority) an opportunity of being heard or of submitting representations in writing. They have certain other powers. They may "approve the rent pay-"able under the contract." They may "reduce it to such sum "as they may in all the circumstances think reasonable." The word "it" must clearly refer to "the rent payable under the "contract." The tribunal may therefore "reduce the rent "payable under the contract to such sum as they may in all "the circumstances think reasonable." This must, in my judgment, mean that the tribunal is given a power to effect a statutory modification of the contract. This was denoted in the judgment of this court in *Bowness* v. *O'Dwyer*,[1] where in dealing with section 2 (2) it was said [2]: "the scheme of the Act appears "to be that the tribunal has power to alter the existing contract "for the future, but not retrospectively, by reducing the rent "payable under the contract."

It next becomes necessary to consider the further power given by the modification. If the modification is read into subsection (2), then it seems to me that the powers of the tribunal on a reference under subsection (3) are to reconsider the rent entered in the register on the ground of change of circumstances, and (1) to approve the rent payable under the contract, or (2) to reduce the rent payable under the contract, or (3) to increase the rent payable under the contract. Any reduction or increase must be to such sum as the tribunal may in all the circumstances think reasonable. Just as the exercise of the power to reduce has the effect of altering an existing contract for the future, so the exercise of the power to increase will have a similar effect.

Mr. Plume submitted that in the absence of words such as those found in section 40 of the Housing Repairs and Rents Act, 1954 (namely, the words "the landlord shall be entitled to "recover the amount of the increase agreed or determined as "aforesaid notwithstanding anything in the terms of the tenancy "or statutory tenancy or any enactment") a reference to a tribunal cannot result in any obligation to pay more rent than is provided for in a contract. But in my judgment the exercise of a power to increase the rent payable under a contract must result in such an obligation. In this context, in my judgment, the sum payable under a contract is the sum which has to be paid under the contract and which therefore becomes due and owing under the contract. If the sum payable under the contract is reduced, then only the reduced amount is due under the contract. More than the contractual amount, as reduced, must not (after there is entry in the register) be demanded (see section 4 (1)). If the sum payable under the contract is increased, then the increased amount is as from the date which is specified due under the contract. Again, once the increased figure has been entered in the register, demand for any more than the increased rent payable must not be made (see section 4 (1)).

---

[1] [1948] 2 K.B. 219; 64 T.L.R. 367; [1948] 2 All E.R. 181.

[2] [1948] 2 K.B. 219, 225.

Where there has been a reference to a tribunal of a contract between a lessor and a lessee, and where as a result there has been an entry in the register of "the rent payable for" the premises, then, if the lessee vacates and if a new contract is made with a new lessee, it is probable that the rent will be of the amount entered in the register. The lessor cannot demand payment of any greater sum (see section 4 (1)). But the new lessee could go to the tribunal, in spite of the contractual terms of the lease, and ask for reconsideration of the rent entered in the register and ask for a reduction of the rent payable under the contract. The lessor might have been quite unwilling to make a contract at a lower rent. Yet the new lessee could claim a reduction. It would seem very strange if Parliament had enacted that a variation could always be downwards but never upwards, even though the rent in the contract was not the result of free negotiation, but was limited so as not to exceed the rent last fixed by the tribunal.

If the rent in a new lease was agreed at less than the amount entered in the register, a reference to the tribunal would be unlikely. Thus, to take an example with figures that are perhaps improbable, if the rent payable for the premises was entered at £500 and the rent in a new contract was £400, either party could refer the "case" to the tribunal. They could refer it for "reconsideration of the rent entered" (that is to say, the £500) on the ground of change of circumstances. The lessor would be unlikely to do this for, having agreed a rent of £400 when he was free to charge £500 if he could get it, he would be unlikely to persuade the tribunal to reconsider, in any way that he would welcome, the rent entered in the register, or to persuade them to increase the rent of £400. The lessee would be unlikely to refer the "case," for it would be unlikely that the tribunal would reduce the rent of £400.

In my judgment, in the circumstances of this case the tribunal had power to increase the sum payable under the contract. The tribunal altered the contract by increasing the rent payable as from December 21, 1955. The respondent became liable to pay at the increased rate.

I think, therefore, that the appeal succeeds.

C. A.
1957

VILLA D'ESTE RESTAURANT LTD. v. BURTON.

ORMEROD L.J. I agree that this appeal should be allowed. The question for decision is whether the appellants (the lessors) are entitled to recover from the respondent (the lessee) an increased rent of the premises Flat No. 4 at No. 1, Lancaster Gate, London. [His Lordship stated the facts and continued:]

The question turns on the proper construction of section 2 (3) of the Act. Mr. Sherrard, on behalf of the lessors, argued that, as the effect of the subsection is to give the tribunal power in a proper case to increase "the rent payable," this must mean a power to increase "the rent payable under the contract." Subsection (3) enacts that the provisions of subsection (2) shall apply "subject to the modification that the tribunal shall have power "to increase the rent payable"; and subsection (2) empowers the tribunal on a reference to approve the "rent payable under "the contract" or reduce it or dismiss the reference according as they may think reasonable. It would seem, therefore, reading the two subsections together, that their combined effect is to give the tribunal power in a proper case to increase the rent payable under the contract. Support for this construction is, in my view, provided by section 3 of the Act, which provides for a register to be prepared and kept by the local authority. Subsection (2) of section 3 provides that the register shall be so prepared and kept as to contain specified entries with regard to "any contract under which a rent is payable that has been "approved, reduced or increased under the last foregoing section." It is interesting to note, too, that subsection (4) of section 2, which deals with references of contracts whereunder the rent includes payment for services, gives to the tribunal power to "approve" a higher rent if there has been an increase in the cost of providing such services since September 3, 1939. The difference in the wording between this subsection and subsection (3) seems to imply that a rent in a case under subsection (4) may only be increased up to an approved amount by agreement.

As I have said, my view of the combined effect of subsections (2) and (3) is that the tribunal is empowered in a proper case to increase the rent payable under the contract, and the conclusion would seem to follow that there may in consequence be a statutory alteration of the terms of a contract of tenancy which the parties are bound to observe.

Mr. Plume argues that this is not so. His submission is that even if the proper construction of the subsection is to empower the tribunal to increase the rent payable under the contract the effect is not to make the lessee liable for a larger rent than that reserved by the lease but, if the increase was more than a reinstatement of a rent previously reduced, to cause the increased rent to be entered in the register in respect of the premises which could become the rent reserved in any future contract of tenancy. He pointed out that if the rent payable under the contract was reduced the lessee was protected by section 4, which makes it unlawful to require or receive any rent in excess of that entered in the register, but that there was no specific provision for the recovery of an increase of rent, similar, for instance, to section 40 (2) of the Housing Repairs and Rents Act, 1954, which gives a landlord power to recover the amount of certain agreed or determined increases notwithstanding the terms of the tenancy. I find it difficult to accept this view. Subsection (3) is clearly intended for the relief of landlords and the effects of the suggested construction would be most uneven, depending as they would on the length of the tenancy.

It was suggested during the course of the argument that, as the lease in question was a document under seal, the terms of which the parties covenanted to observe, a court would be particularly reluctant to adopt a construction of the section which would have the effect of altering the terms of the covenants unless it was expressed in the clearest manner. This is an attractive argument, but in my view should not prevail here. The section is not dealing primarily with contracts under seal. It is dealing with contracts of tenancy, which may be leases under seal, or simple contracts in writing, or even oral according to circumstances.

A different approach to the construction of subsection (3), and one which commends itself to the Master of the Rolls, is based on the words which empower the parties to the lease or the local authority "to refer *the case* to the tribunal for *reconsideration* of the rent so entered, etc."

There was some discussion during the argument of the reason for the use of the word "case." In my view it is used because the reference causing the original entry in the register may well have been under a different contract from the one being referred. But it is argued that as "reconsideration" can only refer to reconsideration of a rent which has been determined on a previous reference, therefore the power to increase is limited to an increase to some figure from which it has previously been reduced. I find that I cannot agree with this view. It is true that some colour is lent to it by the fact that on an original reference the tribunal has no power to increase. It may only approve or reduce. And it may therefore be argued that increase under subsection (3) should be nothing more than a partial or total reinstatement of the previously reduced rent. But there are, in my view, several objections to it. Subsection (3) is not, as I see it, necessarily dealing with a reference for reconsideration of a contract which has already been referred. It is dealing with a "rent." The original reference may have been under an earlier contract where the rent was reduced from a figure higher than the rent reserved in the contract in question. In this case the original rent which was reduced by the tribunal on October 27, 1949, was £413 15s. 6d. Would the effect of the increase to the original figure entitle the landlord to recover the rent in excess of the reserved rent? This seems to be the only logical conclusion. Again, if the suggested construction is the correct one it could only operate if the rent had been reduced, either under the subsisting contract or some earlier one, whereas it appears from the opening words of the subsection that it is intended to deal with the rent payable for any premises entered in the register. And rent must be entered in the register if it has been reduced, or approved or indeed increased. But perhaps the most cogent argument against a construction of the subsection which so limits the power of the tribunal to increase the rent payable is that the subsection contains no express limitation of the power and I can find no sufficient indication from the words that such a limitation should be implied.

For these reasons I am of opinion that the appeal should be allowed.

LORD EVERSHED M.R. I regret to find that I have arrived at a conclusion upon this short point different from that which has commended itself to both my brethren; for in my judgment "the increase of the rent payable" (to use the language of section 2 (3) of the Act) by the tribunal from £393 9s. 0d. to £452 12s. 6d. in December, 1955, has not, in the circumstances, been to allow the appellants now to claim that increased rent from their lessee, the respondent.

It has been the contention of the appellants that, by the terms or the necessary inference of the statute, the effect of "the "increase of the rent payable" (and its registration pursuant to section 3) is to substitute the increased figure of £452 12s. 6d. for the figure of £393 11s. 0d. specified in the lease of the premises from the appellants to the respondent dated September 28, 1954; and it is said, with some force, that since a reduction by the tribunal of the contractual rent payable by a tenant to a landlord has the practical effect of substituting the reduced rent for the contractual rent—and since, therefore, the contract between the parties is to that extent overridden—it is both just and natural that the landlord should get a corresponding benefit in the converse case of a rent increase. I have been unable to extract that result from the language of the Act. It is not in doubt that the Act nowhere in terms so provides; and for my part I am unable to agree that such is the Parliamentary intention according to the necessary implication of the relevant sections.

Mr. Plume contended that section 2 (3) contemplated the making of references by a landlord (or a local authority) at a time when no contract subsisted in regard to the premises concerned —provided only that there had earlier been a reference relating to the premises which had resulted in an approval or reduction of the then contractual rent followed by registration of the rent so approved or reduced. It was on this ground that (according to Mr. Plume) the language of subsection (3) of the section does not wholly correspond with that of subsection (2)—particularly by the use of the terms "rent payable for any premises" or "rent payable" instead of "rent payable *under the contract.*" On this view the increased registered rent becomes merely a maximum lawfully chargeable by the landlord when he thereafter lets the premises.

It is not, in my judgment, necessary to express a view on this part of Mr. Plume's argument. I must not be taken to accept it. But I am content to assume that the references contemplated by section 2 (3) are references (like those under subsection (2)) during the pendency of a lease or tenancy. I am further content to assume that the "rent payable" mentioned in subsection (3) means the rent payable under a subsisting contract. The latter assumption at least makes easier the incorporation into subsection (3), by reference, of the provisions of subsection (2); and is, moreover, supported by the terms of subsection (2) of section 3 providing that the register must "contain "with regard to any contract under which a rent is payable that "has been approved, reduced *or increased*" the entries there specified.

Even so, however, the conclusion sought by the appellants in the present case does not, as it seems to me, follow. By its reference to the rent payable under a contract is, in my judgment, meant the rent payment of which can be demanded or enforced under that contract. In the case where the contractual rent has been approved no difficulty, obviously, arises. In the case where the rent has been reduced, the consequence is expressly covered by the terms of section 4 which makes it unlawful for the landlord to require or receive rent in excess of the reduced rent entered on the register and provides that any sum paid by way of rent in excess of the reduced registered figure should be recoverable by the tenant. The provisions of this subsection plainly apply not only to the then subsisting contract (notwithstanding its express terms) but also (as I understand the argument) to any contract later made while the reduced rent remains upon the register, at least to the extent of any rent actually demanded or paid under such later contract. I am not entirely clear how far the appellants go in their argument that a rent approved or reduced by the tribunal under section 2 (2) is automatically substituted for the rent expressed to be payable under (a) an existing, or (b) any further contract (so long as that rent remains on the register). So far, however, as the existing contract is concerned, section 4 would (on the appellants' view) be otiose—and not required to achieve the penal purposes of section 9. In any case, if section 2 (2) and (3) have the automatic consequences contended for by the appellants, I cannot think that section 4 would have taken its existing form.

This brings me to the converse case: for whatever be the purpose of, and reason for, section 4, it is clear, as I have already stated, that there is nowhere found any express provision substituting a rent increased by the tribunal for a lower rent contained in an existing contract—still less (if such is suggested to be the intention) for that contained in a contract subsequently made, a matter to which I will later return. There is not even found in regard to the power of increase in section 2 (3) the qualification "to such sum as [the tribunal] may in all the "circumstances think reasonable" which is applied to the power of reduction and is also found in subsection (4) of section 2. Yet, as Mr. Plume reminded us, when Parliament in the later Act in pari materia, the Housing Repairs and Rents Act, 1954, clearly desired to provide in the landlord's favour for the substitution of a higher rent for that expressed in the contract, it did so in clear language: see section 40 (2) of the Act of 1954, which lays it down that where the tribunal constituted under the Act of 1946 has determined that, on the grounds there stated, it is just that the landlord should be entitled to an increase of rent, "the landlord "shall be entitled to recover the amount of the increase . . . "notwithstanding anything in the terms of the tenancy."

It is, in my judgment, legitimate to bear in mind the circumstances in which the Act of 1946 was passed. The main purpose of the Act plainly was to protect a tenant, in the notorious conditions then prevailing of housing shortage, against undue charges for rent. Section 2 (2) contemplated an approval or a reduction, but not an increase, of rent, and a reference capable of resulting in an increase in the rent payable under subsection (3) (for cases under subsection (4) can for present purposes be omitted from consideration) requires that there should have previously at some time been a reference under subsection (2). In existing circumstances the normal case of increase contemplated by subsection (3) (though the subsection may not be so confined by its terms) would be the case where for one reason or another a rent previously reduced would be again increased to some figure not by any means necessarily as great as, but certainly not exceeding, the contractual rent. In all such cases no difficulty would arise. The express terms of the Act (including the provisions of section 4) provide for the result without any theory of "substitution" of the registered rent for the contractual rent.

What, then, is the position in a case, such as the present, where the tribunal has decided or purported to decide upon an increase to a figure above the figure stated in the existing contract? In the present case, I observe that the terms of the "contract" are contained in a lease under seal in common but elaborate form. The respondent is, in consideration of "the rent "hereby reserved," granted a term of five years and the appellants' rights of re-entry and the like are, by clause 4 of the lease, expressed to come into existence in the event of "the rent hereby "reserved or any part thereof" being in arrear as there specified. Prima facie, under such a document—put forward, incidentally, by the appellants though paid for by the respondent—the appellants would clearly be estopped from asserting that the rent was other than as therein stated. (It is true that the respondent appears to have attended and argued before the tribunal in December, 1955, but no point has been made that he has thereby in any way altered his position.) In such a case as the present, it would, in my judgment, have at the least to be shown in order to sustain any claim for rent above that stated in the lease, by reference to clear language or necessary implication in the statute, that the Act of 1946 superseded the lease and the legal rights thereby created or ensuing (for example, the right to distrain on non-payment of rent). And in my judgment it is not so shown. Nor is the result to render the Act by any means practically ineffective in cases of increase of rent under section 2 (3). I have already mentioned the case—prima facie, as I think, the common case—where the increase following a previous reduction still does not exceed the contractual rent. Nor would there be any difficulty in a landlord properly protecting himself against the event of an increase above the contractual rent. The rent provided in the lease could well be stated as £X together with such further sum (if any) as the tribunal under the Act of 1946 might from time to time authorize. Indeed, in the lease under consideration provision is expressly made for additional rent corresponding to rate increases, though it was conceded by Mr. Sherrard that, in the existing circumstances, such increases could not be lawfully demanded without a prior authorization of the increase by the tribunal. In my judgment, therefore, proper effect can be given to the terms of section 2 (3) of the Act without any implication of a provision for substituting the increased rent for the (lower) contractual rent.

In my judgment the clue to the problem is provided by the use of the words "the case" and "reconsideration" in section 2 (3). There was some discussion of the two former words during the argument, and Mr. Plume was content that the words should not be treated as synonymous with "the "contract," so as to limit the application to one under a contract which, as such, had already been the subject of previous registration (as the present lease had not). He was content, in other words, to treat "the case" as meaning "the question of the "rent payable for the particular premises." Even so, the invocation of the subsection is for a reconsideration of that subject-matter, that is of the previous determination of the tribunal in regard to it, "on the ground" that the circumstances have since changed. I observe that as regards any premises the initial reference must be limited either to approval or to reduction of the contractual rent. There can, on this first occasion, be no possibility of an increase of the contractual rent whatever the circumstances. In the simple case—as I think, the ordinarily contemplated case—what, upon an application under subsection (3) the tribunal is called upon to do is to "reconsider" (because of changed circumstances) its previous determination either to approve or to reduce the contractual rent—in the first alternative, obviously, upon the lessee's application, in the latter upon the lessor's. In the case, then, of a *first* application under subsection (3) by a lessor (and I am for simplicity assuming the

C. A.
1957

VILLA D'ESTE RESTAURANT LTD.
v.
BURTON.

Lord Evershed M.R.

continuance of the same lease), there could, in my judgment, be no question of an increase of the rent to a level above the contractual level—a thing which the tribunal could never have done on the initial reference under subsection (2) and which, in my view, it could no more do upon a reconsideration of the case when first applied to under subsection (3).

But it is no doubt true (for such is the necessary effect of the opening words of the subsection) that an application may be made under subsection (3) when the rent for the premises entered in the register has been *increased*, that is, pursuant to an earlier reference under the same subsection, though not, for reasons which I have given, to a level higher than the contractual rent, at least if the earlier reference was the first under the subsection. Is the result different? Is it the capricious effect of the subsection that an increase of the rent above the contractual level is permissible provided that there has been a previous reference under the subsection which has resulted in an increase—albeit to a level not above the contractual level? In my judgment such a result would be highly unreasonable. The reconsideration can never involve, in my judgment, such disregard of the contractual rent.

I have assumed in the preceding paragraphs the continuance of a single contractual rent. The intervention of new contracts at new rents involves added complications to which my brother Ormerod has adverted in his judgment. But I do not think it necessary to pursue them. The questions which my brother has posed emphasize the fact that in this case (but not for the first time) the court is not so much asked to say what, according to the language used, Parliament had it in mind to provide, as to apply the Parliamentary language to circumstances which Parliament cannot ever have contemplated at all. My analysis is, in my judgment, sufficient to support the view that, in the absence of clear terms, the provisions of the Act do not contemplate or permit the inference that, in such a case as that with which we are concerned, the increased figure determined upon by the tribunal is for all purposes to be substituted for the rent specified in the lease current between the parties.

I have already referred to the question of the effect of an increase in the rent payable, such as that now under consideration, upon any future contract or lease entered into by the appellants in regard to the premises. Suppose after the determination of the present lease with the respondent, the appellants entered into a new lease with some third party, in all material

C. A.
1957

Villa D'Este Restaurant Ltd.
v
Burton.

Lord Evershed M.R.

respects (including the amount of the rent) identical with those in the present lease. Would the appellants nevertheless be entitled to claim rent at the registered figure of £452 12s. 6d. per annum? Would what I will call the "substitution theory" go so far? Mr. Sherrard said not—on the ground, as I understood him, that the appellants would in truth then be estopped, or on the ground that the lessee's acceptance of a five year term would be taken as good consideration for the appellants' acceptance of a sum for rent less than that which they could lawfully demand. I find, for my part, the answer far from wholly satisfying, but it is unnecessary to give a definite answer to the question suggested. I would, however, make this comment upon the general argument of "fairness" mentioned at the beginning of this judgment. If the appellants are right, a landlord may enter into a lease for, say, seven years with a lessee at £X per annum, being, as the landlord knows, the maximum figure which the lessee is prepared or can afford to pay; the landlord may then "refer the "case" to the tribunal and obtain an increase of the rent to £X plus Y: and the lessee would be bound for the full term to pay that increased sum of £X plus Y per annum, and have no opportunity of limiting his liability by an earlier determination of the lease.

I do not forget the language of section 3 (2) of the Act to which Ormerod L.J. referred during the argument and which I have earlier quoted. If my view is right, the rent payable "under" the respondent's lease has not, in law, been increased: and therefore no entry under the subsection would strictly have to be made. Alternatively, if the entry is made (as in fact it has been), then in law it is ineffective to alter the terms of the existing lease; though it would operate to authorize the appellants upon the occasion of any fresh lease (unless reduced again in the meantime) to require a rent at the rate of £452 12s. 6d. per annum. In any event, section 3 is primarily concerned with registration and cannot, in my judgment, suffice by inference to override the express provisions of the existing lease under seal.

I would dismiss the appeal.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Hunters; Asher, Fishman & Co.*

E. D.

ANGLO-SAXON PETROLEUM CO. LTD. *v.* ADAMASTOS SHIPPING CO. LTD.

1957
Jan. 16,
17, 18;
Feb. 1.

Devlin J.

C. A.

Apr. 8, 9,
10, 11, 16.

Denning,
Parker and
Sellers L.JJ.

Shipping — Charterparty — Clause paramount — "This bill of lading" subject to Act—Whether clause meaningless—Hague Rules—"Loss "or damage arising . . . from unseaworthiness" — Meaning of "loss or damage" — Whether applicable to non-cargo-carrying voyages — Whether applicable only to physical loss or damage — Carriage of Goods by Sea Act of United States, 1936, *ss.* 2, 3 (1), 4 (1) (2), 5 *and* 13*—Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Schedule, Arts. II, III, rr.* 1, 8; *IV, rr.* 1, 2; *V.*

Contract—Construction—Repugnancy.

Shipping — Charterparty — Consecutive voyage charter — Extent and nature of owners' obligations to provide and maintain seaworthy vessel during "the voyage" — Continuing warranty of seaworthiness, perils of sea excepted—"Proceed with all convenient "despatch" — Vessel rendered unseaworthy by incompetence of staff—Owners vicariously liable for negligence of servants despite owners' exercise of due diligence in selection and appointment of staff—Delays—Whether claim for loss of services of vessel sustainable—Basis for assessment of damages.

Arbitration—Case stated—Form—Undesirability of construing with too rigid an eye.

A tanker was chartered by an oil company, under a charter expressed to remain in force for as many consecutive voyages for which the vessel could tender for loading within a period of 18 months, to carry cargoes of oil all over the world at specified rates of freight per ton per voyage or a return cargo of fresh water at a lump sum. Clause 1 of the charterparty provided that the vessel "being tight, staunch and strong and every way fitted for the "voyage, and to be maintained in such condition during the "voyage, perils of the sea excepted, shall with all convenient "despatch sail and proceed to" a nominated port and there load a cargo of oil.

The following clause was incorporated in the charterparty by a typed slip: "Paramount clause. This bill of lading shall have "effect subject to the provisions of the Carriage of Goods by Sea "Act of the United States . . . 1936, which shall be deemed to "be incorporated herein, and nothing herein contained shall be "deemed a surrender by the carrier of any of its rights or immuni-"ties or an increase of any of its responsibilities or liabilities under "said Act. If any term of this bill of lading be repugnant to said "Act to any extent, such term shall be void to that extent, but no "further."

The owners, exercising due diligence, selected and appointed an engine-room staff, but that staff proved incompetent, and by reason of their incompetence (amounting to unseaworthiness) the vessel broke down on the first voyage to her loading port, and other similar incidents followed, with the result that the charterers lost the services of the vessel during 106 days.

Devlin J. held (1) that the paramount clause could be incorporated in the charterparty by applying to the words "This bill "of lading" the principle of falsa demonstratio non nocet, and that accordingly the provisions of the United States Act affected the rights and liabilities of the parties in so far as those provisions were sensible of incorporation; (2) that the immunity given to the owners by the preamble and section 13 of the Act in connexion with cargo-carrying voyages "to or from ports in the United States" extended to other cargo-carrying voyages contemplated in this charterparty, but did not, on the true construction of "voyage" in sections 3 (1) (*c*) and 4 (1) of the Act as incorporated in the charterparty, cover the non-cargo-carrying voyages carried out under it; and (3) that the words "loss or damage" in section 4 (1) and (2) of the Act did not relate only to physical loss of or damage to goods, but to loss or damage "*in relation to* the loading, hand"ling, stowage, carriage, custody, care and discharge of" the goods within the meaning of section 2.

Semble. "In relation to" in that context had the same meaning as "in connexion with" in section 3 (8), and such loss or damage includes loss caused by delay or misdelivery, but not loss of chartered services.

G. H. Renton & Co. v. *Palmyra Trading Corporation of Panama* [1957] A.C. 149; [1956] 3 All E.R. 957 considered.

Dictum of Atkinson J. in *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.* [1940] 1 K.B. 812, 840; 66 Ll.L.Rep. 147 explained.

On appeal by the charterers and cross-appeal by the shipowners:—

Held, (1) that although the court would only in the last resort disregard as nonsense what commercial men had agreed upon, it was unable to construe the paramount clause in this setting without results so incongruous that it could not be supposed that the parties ever intended to produce them, and the clause must accordingly be rejected in toto as insensible; a fortiori, where the owners sought to rely on this clause to exempt them from liability for breach of their obligations under the contract, for an exempting clause must be in clear, effective and precise terms. Any attempt by the court to give effect to the apparent intention of the parties to incorporate the Hague Rules by selecting such provisions of the Act as might apply to this charterparty would, in effect, be to make a new contract between the parties.

Per Denning L.J. The exception of responsibility for "loss or "damage" in section 4 (2) of the Act, in a bill of lading, exempts the carrier from loss or damage in relation to the loading and handling of the goods and so forth: see section 2.

Per Sellers L.J. It may well be that the construction of the Hague Rules (or the provisions of the United States Carriage of Goods by Sea Act, 1936) simpliciter would be different from the construction of any given provision in the setting of a charterparty.

Petrofina S.A. of Brussels v. *Compagnia Italiana Trasporto Olii Minerali of Genoa* (1937) 53 T.L.R. 650; 57 Ll.L.Rep. 247; 42 Com.Cas. 286 applied.

Leeds Shipping Co. Ltd. v. *Duncan Fox & Co. Ltd.* (1932) 42 Ll.L.Rep. 123; 37 Com.Cas. 213 and *Minister of Food* v. *Reardon Smith Line Ltd.* [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265 distinguished.

(2) That the obligations of the owners under this form of consecutive voyage charter (which was different in kind from a time charter) were (a) an obligation, express or implied, to ensure at the beginning of each successive voyage contemplated by the charter that the vessel was in a seaworthy condition; (b) a continuing express warranty to maintain the vessel in a seaworthy condition during each successive voyage over the whole period of the charter, perils of the sea excepted; (c) an obligation, express or implied, to proceed to each nominated port of loading and complete with all convenient despatch as many voyages as possible within the period of the charterparty (subject only to certain express exceptions in a clause not relevant in the events which happened); and (d)—subject to the same express exceptions—an implied vicarious liability for the failure by their servants to use reasonable care and skill.

(3) That by reason of the incompetence of the engine-room staff amounting to unseaworthiness, the owners were, despite their own exercise of due diligence, in breach of each of those obligations in respect of various of the voyages undertaken, and were accordingly liable to the charterers for loss of use of the vessel; and that damages for proved breaches were not confined to the particular voyage in which each breach occurred but the delays could be aggregated on a claim for loss of services of the vessel.

Per Denning L.J. The obligation to maintain is absolute, save only when the vessel is rendered unseaworthy by perils of the sea.

Per Parker L.J. The nature of the obligation to maintain must depend on the exact words used. In its present form it can only be read as a continuing warranty of seaworthiness.

Per Sellers L.J. A vessel is maintained in a watertight condition by the necessary inspections and surveys, replacements and repairs. It is not so maintained if it is allowed to leak and is then repaired with despatch and diligence.

Decision of Devlin J. (on the first question) reversed.

SPECIAL CASE stated by an umpire (Mr. John Megaw Q.C.).

On May 25, 1950, the oil tanker *S.S. Saxon Star*, owned by the Adamastos Shipping Co. Ltd., was chartered to an oil company, the Anglo-Saxon Petroleum Co. Ltd., by a consecutive voyage charterparty, made in London. The contract documents consisted of (1) a printed form dated May 25, 1950, signed by the parties and headed "Tank Vessel Voyage Charterparty"; (2) typed clauses 24 to 52 attached which were expressly incorporated by a provision typed at the foot of the printed form; (3) certain named clauses referred to in clause 52, including, on a typed slip annexed to the charterparty, the clause hereafter referred to as the "Paramount clause," as follows: "Paramount "clause. This bill of lading shall have effect subject to the pro"visions of the Carriage of Goods by Sea Act of the United States, "approved April 16, 1936,[1] which shall be deemed to be incor"porated herein, and nothing herein contained shall be deemed a "surrender by the carrier of any of its rights or immunities or an

---

[1] (United States) Carriage of Goods by Sea Act [*Public—No. 521—74th Congress*]: "Be it enacted by the "Senate and House of Representa"tives of the United States of "America in Congress assembled, "That every bill of lading or similar "document of title which is evidence "of a contract for the carriage of "goods by sea to or from ports of "the United States, in foreign trade, "shall have effect subject to the pro"visions of this Act. . . .

"S. 2. *Risks.* Subject to the pro"visions of section 6, under every "contract of carriage of goods by sea, "the carrier in relation to the load"ing, handling, stowage, carriage, "custody, care, and discharge of "such goods, shall be subject to the "responsibilities and liabilities and "entitled to the rights and immuni"ties hereinafter set forth.

"S. 3. *Responsibilities and Lia"bilities.* (1) The carrier shall be "bound, before and at the beginning "of the voyage, to exercise due "diligence to—(*a*) Make the ship "seaworthy; (*b*) Properly man, equip, "and supply the ship; (*c*) Make the "holds, refrigerating and cooling "chambers, and all other parts of "the ship in which goods are carried, "fit and safe for their reception, "carriage and preservation. . . .

"(8) Any clause, covenant, or "agreement in a contract of carriage "relieving the carrier or the ship "from liability for loss or damage "to or in connexion with the goods, "arising from negligence, fault, or "failure in the duties and obligations "provided in this section, or lessen"ing such liability otherwise than as "provided in this Act, shall be null "and void and of no effect. . . .

"S. 4. *Rights and Immunities.* "(1) Neither the carrier nor the ship "shall be liable for loss or damage "arising or resulting from unsea"worthiness unless caused by want "of due diligence on the part of the "carrier to make the ship seaworthy, "and to secure that the ship is "properly manned, equipped, and "supplied, and to make the holds, "refrigerating and cooling chambers, "and all other parts of the ship in "which goods are carried fit and safe "for their reception, carriage, and "preservation in accordance with the "provisions of paragraph (1) of sec"tion 3. Whenever loss or damage "has resulted from unseaworthiness, "the burden of proving the exercise "of due diligence shall be on the "carrier or other persons claiming "exemption under this section.

"(2) Neither the carrier nor the "ship shall be responsible for loss or "damage arising or resulting from— "(*a*) act, neglect, or default of the "master, mariner, pilot, or the ser"vants of the carrier in the naviga"tion or in the management of the "ship; . . .

"S. 5. . . . The provisions of "this Act shall not be applicable to "charterparties; but if bills of lading "are issued in the case of a ship "under a charterparty, they shall "comply with the terms of this "Act. . . .

"S. 13. This Act shall apply to "all contracts for carriage of goods "by sea to or from ports of the "United States in foreign trade. ". . ."

"increase of any of its responsibilities or liabilities under said "Act. If any term of this bill of lading be repugnant to said Act "to any extent, such term shall be void to that extent, but no "further."

Clause 1 of the charterparty provided "that the said vessel "being tight, staunch and strong, and every way fitted for the "voyage, and to be maintained in such condition during the "voyage, perils of the sea excepted, shall, with all convenient "despatch, sail and proceed to" one of several named ports and there load a full and complete cargo of oil. Clause 9 exempted the shipowners from liability, inter alia, for "perils of "the sea," "accidents of navigation even when occasioned by "negligence" and "any latent defect in the machinery . . . not "resulting from want of due diligence by the owners." Clause 43 of the charterparty, as amended, provided: "This charter-"party is to remain in force for as many consecutive voyages "for which vessel can tender for loading within a period" of 18 months expiring on December 31, 1951. The vessel was to carry oil from one part of the world to another at specified rates of freight per ton per voyage or a return cargo of fresh water at a lump sum. The charter contained no provision relating to the issue of bills of lading.

Before entering on the chartered service, the vessel was surveyed and repaired at Baltimore in the United States. On July 27, 1950, she entered on the charter. She sailed from Baltimore for Curaçao in the Dutch West Indies to load her first cargo under the charterparty, but on the way she broke down and had to be towed into San Juan (Puerto Rico) for repairs. Some repairs were done at San Juan, but they were not done properly. The boilers were left in a condition in which they were likely to leak. She got to Curaçao and loaded a cargo of oil for carriage to Buenos Aires. She set sail from Curaçao on August 19, 1950, but within three or four days the boilers began to leak and continued leaking so badly that she had to put into Recife, the Port of Pernambuco, Brazil, for repairs. She was there for a fortnight and properly repaired and left on September 19 for Buenos Aires, where she docked on October 2 and discharged her cargo of oil. She then picked up a cargo of fresh water from the river and set sail back to Curaçao. On the way back there was continuous trouble with the machinery, such that when she arrived in Curaçao on November 5, the plant of the ship was again in complete chaos. At Curaçao she discharged her cargo of fresh water and took on a cargo of oil. Some repairs were done at

1957

ANGLO-SAXON PETROLEUM CO. LTD. *v.* ADAMASTOS SHIPPING CO. LTD.

Curaçao, but only sufficient to enable her to go to the United States for much more extensive repairs. She eventually left Curaçao on November 30 for New Jersey. She got there on December 13 and, having discharged her cargo, went in for extensive repairs, which took nearly two months. Eventually, on February 10, 1951, she left, and there was no more trouble. Thereafter, during the period of the charterparty, the vessel functioned satisfactorily.

The charterers claimed that as the result of these troubles they had lost the services of the vessel for 106 days, and that their damages were some £80,000, the difference between the charter and market rates of freight on cargo-carrying voyages which might have been performed during the 18 months if the vessel had been continuously fit for service. The owners denied liability, contending that their only obligation was to exercise due diligence themselves personally, and that they had done so. The claim went to arbitration and, by agreement of the parties, the umpire (Mr. John Megaw Q.C.) made his interim award as to liability alone. The hearing took place on 18 days between April 10 and June 4, 1956. Documents comprising some hundreds of pages were placed before the tribunal and lengthy oral evidence was given. Numerous issues of fact and of law were raised by the parties, the issues of fact in many instances involving detailed and elaborate investigation by reference to contemporary documents, and oral evidence, including evidence of expert witnesses.

The umpire made the following findings of fact: (1) That on the vessel's departure from Baltimore on July 17, 1950, although she was seaworthy as regarded her machinery, she was not seaworthy in that the engine-room staff were incompetent; but that due diligence had been exercised by the owners in the selection and appointment of the engine-room staff. (2) That the damage to the machinery which was caused between Baltimore and San Juan was caused by the incompetence of the engine-room staff, which resulted in a series of negligent acts and omissions. (3) That on the vessel's departure from Curaçao on August 19, 1950, she was not seaworthy in respect of her machinery and due diligence had not been exercised to make her seaworthy. The vessel further was not seaworthy in that the engine-room staff were incompetent; but due diligence had been exercised by the owners in that respect; and in that respect, though not in respect of her machinery, reasonable and proper steps had been taken to put the vessel in a seaworthy condition.

(4) That the damage to the machinery which was found at Recife was caused by the unseaworthiness of the vessel at the start of the voyage from Curaçao, which unseaworthiness was, in its turn, caused as in (2) above, the defects thus caused not having been fully repaired at San Juan. (5) That on the vessel's departure from Buenos Aires on October 5, 1950, she was seaworthy in respect of her machinery; but not seaworthy in that the engine-room staff were incompetent; but due diligence had been exercised by the owners in that respect, and all reasonable and proper steps had been taken to put the vessel in a seaworthy condition both as regarded machinery and engine-room staff; and (6) that the damage to the machinery which occurred between Buenos Aires and Curaçao was caused by the incompetence of the engine-room staff, which resulted in a series of negligent acts and omissions.

The umpire, in paragraph 56 of the award, stated for the decision of the court the following questions of law: Whether on the facts as found and on the true construction of the charterparty the owners were in breach of the charterparty: (1) in that the *Saxon Star* was not seaworthy when she sailed from Baltimore on July 27, 1950; (2) in that the breakdown of the machinery of the vessel between Baltimore and San Juan was caused by the negligent acts or omissions of the engine-room staff; (3) in that the vessel was not maintained in seaworthy condition during the voyage from Baltimore to Curaçao; (4) in that the vessel was not seaworthy when she sailed from Curaçao on August 19, 1950; (5) in that the vessel was not maintained in seaworthy condition during the voyage from Curaçao to Recife; (6) in that the breakdown of the machinery of the vessel between Curaçao and Recife was caused by the prior negligent acts or omissions of the engine-room staff; (7) in that the vessel was not seaworthy when she sailed from Buenos Aires on October 5, 1950; (8) in that the breakdowns of the machinery of the vessel between Buenos Aires and Curaçao (save only the breakdowns of the windlass) were caused by the negligent acts or omissions of the engine-room staff; (9) in that the vessel was not maintained in seaworthy condition during the voyage from Buenos Aires to Curaçao; (10) in that the owners failed to ensure that the vessel performed her service under the charterparty with all convenient despatch; or (11) on any other ground?

In paragraph 57 he awarded that the owners were, subject to the court's decision on the questions of law, liable to the charterers, who were on that basis awarded the costs of the reference. In paragraph 58 he awarded that if the court answered the questions of law in paragraph 56 in the affirmative—" that is, " in the sense that the owners have committed any breach or " breaches of the charterparty "—the interim award in paragraph 57 should stand.

The shipowners appealed, and, before Devlin J., they conceded, in view of the findings of the umpire, that they were liable in one respect, in that repairs had not been properly executed at San Juan, with the result that there had been leakage from the boilers on the way to Recife.

Devlin J. thereupon said that, in view of the phrasing of paragraph 58 above, the question of law was whether on the facts found by the umpire, and on the true construction of the charterparty, the owners were in breach of the charterparty in any one of the 10 respects thereafter particularized, or on any other ground; that the answer to that question was that, by concession on the facts found, the owners were in breach on at least one ground; and that, accordingly, there was nothing for the judge to do but to answer the question addressed to him in the affirmative and uphold the award. As, however, the umpire would have been unable to assess the amount of damages without having the answer to certain other specific questions of law, the judge agreed at the request of the parties to answer three questions of law as if they had been asked by the umpire, as follows:

(1) Whether the United States Carriage of Goods by Sea Act affected the rights and liabilities of the parties under the charterparty.

(2) If the answer to (1) was " Yes," whether under the charterparty any material provisions of the Act affected the rights and liabilities of the parties in connexion with (*a*) non-cargo-carrying voyages, (*b*) cargo-carrying voyages other than those to or from the ports in the U.S.A.

(3) Did the words " loss or damage " in section 4 (1) and/or (2) of said Act relate only to physical loss of or damage to goods?

Ashton Roskill Q.C. and *T. G. Roche Q.C.* for the owners. The main question is: what is the effect of the incorporation in the charterparty of the clause paramount? The umpire treated the clause paramount as meaningless although it was specifically attached to the charterparty. His duty was to ascertain the intentions of the parties according to the following rules: (1) An overstrict construction of commercial documents must be avoided. This rule is based on the common-sense view that although business contracts are often inadequately drafted it is unlikely that businessmen, owners or charterers would intend the introduction of meaningless clauses into their contracts: see *per* Lord Wright in *W. N. Hillas & Co. Ltd.* v. *Arcos Ltd.*[2] (2) Clauses in commercial documents should not be treated as meaningless. That course would be taking refuge in a counsel of despair: see *per* Harman J. in *Treseder-Griffin* v. *Co-operative Insurance Society Ltd.*[3] It is necessary to see (i) the method by which the clause was incorporated, (ii) the meaning of the word "incorporated," and (iii) the consequences of the fact of incorporation. As to (i), see clause 52 of the charterparty and the physical attachment of the paramount clause referred to "as attached" in clause 52. The parties obviously wanted the clause paramount to be incorporated. As to (ii), the meaning of "incorporate" in the Oxford English Dictionary is "to combine or unite into one body" or "to unite so as to form "one body." As to (iii), the consequence of incorporation is: the charterparty plus the clause paramount equals the charterparty. They are one body; therefore the apparent misdescription in the clause paramount, "this bill of lading," is not a misdescription, or, if it is, it is irrelevant. "This bill of lading" means "this charterparty," i.e., this contract. The umpire was wrong in rejecting the clause paramount as meaningless; the inelegance in the contract did not create such ambiguity as to render it meaningless. This is a method used by businessmen of writing things into the contract "short": see Scrutton on Charterparties, 16th ed., p. 464.

Section 5 of the United States Carriage of Goods by Sea Act, 1936, provides that "The provisions of this Act shall not be "applicable to charterparties"; the umpire said that to apply the provisions of the Act to this charterparty would mean reading something into the document. He therefore refused to do so. Although to read something in would be preferable to saying that the clause is meaningless, this is not a case of reading something in but is, in effect, a question of construction. Cases often arise where the line between implication and construction can hardly be drawn: see *Serraino & Son* v. *Campbell.*[4] As to the cases in Scrutton on Charterparties, 16th ed., p. 465, relied on by counsel for the charterers as showing that the clause paramount in this case was meaningless, the fact that different contracting parties have expressed their intentions in different words does not render this clause meaningless. In *Minister of Food* v. *Reardon Smith Line Ltd.*[5] there was a lawyer's clause, not a broker's clause, and different considerations applied.

---

[2] (1932) 38 Com.Cas. 23, 36; 43 Ll.L.Rep. 359 (H.L.).

[3] [1956] 2 Q.B. 127, 160; [1956] 2 All E.R. 33.

[4] [1891] 1 Q.B. 283.

In *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[6] Atkinson J. said [7] that the Hague Rules applied only to damage to goods. This observation and that of Lord Maugham [8] approving it was obiter and, it is submitted, should not be followed. Section 4 of the Act does not apply only in the case of physical loss or damage to goods. The words "loss or damage" in section 4 are quite general in their scope.

As to the applicability of the Act to non-cargo-carrying voyages; one must first look at the nature of the contract. This is all one contract under which the owners undertake to perform services for the charterers on a number of consecutive voyages. The initial obligation of the owners arises at the start of the contract, i.e., the start of the first voyage. The charterparty exceptions applied when the ship broke ground on the first voyage from Baltimore to Curaçao: see Scrutton on Charterparties, 16th ed., pp. 124–125, and *Barker* v. *M'Andrew*.[9] The contract voyage started when the vessel left Baltimore for her loading port and the charterparty exceptions operated to protect the owners as from then. The exceptions are written into the charterparty out of the Act; they are charterparty exceptions, not bill of lading exceptions. The clause paramount which is incorporated in the charterparty must be construed *with* the charterparty and not in isolation. "The voyage" in section 3 (1) means the *charterparty* voyage and includes both a cargo-carrying and a non-cargo-carrying voyage. The provisions of section 4 (1) of the Act give the owners complete protection against a breach of clause 1 of the charterparty, and the Act applies whether or not the vessel is on a cargo-carrying voyage. The trading limits of the charterparty are wide and there is no reason for giving those parts of the Act which are not introduced contractually into the charterparty the limited geographical applicability in relation to United States ports which the Act has statutorily in connexion with bills of lading.

A. A. Mocatta Q.C. and *S. O. Olson* for the charterers. The points raised are: (1) The Hague Rules do not apply to the rights and obligations of the parties under this consecutive voyage charter. (2) If the rules do apply, to what stages or periods of the charter do they apply? (3) Can the owners, by reliance on the Hague Rules, protect themselves against the kind of loss here claimed by the charterers, which is not in respect of loss or damage to goods?

---

[5] [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265.

[6] [1940] 1 K.B. 812; 66 Ll.L.Rep. 147; [1940] 2 All E.R. 46.

[7] [1940] 1 K.B. 812, 840.

[8] [1942] A.C. 154, 175; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[9] (1865) 18 C.B.N.S. 759.

With regard to (1): unless the parties have used language which, on its true construction, has the effect of making the Hague Rules apply, they do not apply, because the United States Carriage of Goods by Sea Act has no application as a matter of law. In view of the difficulties of applying the Hague Rules to a consecutive voyage charter, clear words must be used to bring about that result, because section 5 of the Act itself says that its provisions are not applicable to charterparties. The only thing said by the parties is that the clause paramount shall be incorporated in the charterparty; the clause paramount says "This "bill of lading," why should those words be read as "This "charterparty"? There must be something to show that the parties obviously meant "this charterparty": see Scrutton on Charterparties, 16th ed., p. 551, for section 13 of the Act. Here the parties used a clause designated as a clause paramount dealing with bills of lading which was constructed to comply with section 13 of the United States Act. By the mere words of clause 52 of the charterparty one cannot reach the conclusion that the parties intended the Hague Rules to apply to their obligations under the charterparty, and one cannot read the contract in that sense. The parties intended the clause paramount to apply to bills of lading issued under the charterparty. It is idle for the owners to contend that the parties would never put a meaningless clause in the contract; charterparties frequently contain clauses that are meaningless: *Chandris* v. *Isbrandtsen-Moller Co. Inc.*[10]

"This bill of lading" cannot be read as "this charterparty"; this cannot be a case of falsa demonstratio, because that doctrine deals with wills and bequests where the subject-matter is defined or definable and where, in the instrument, there is both a false and a true description of the subject-matter. There is no doubt whatever of the parties' intentions in falsa demonstratio cases; that is a sine qua non. In *West* v. *Lawday*[11] the doctrine of falsa demonstratio was not applied. In *Cowen* v. *Truefitt*[12] evidence must have been given as to what property the testator

---

[10] [1951] 1 K.B. 240.

[11] (1865) 11 H.L.C. 375.

[12] [1899] 2 Ch. 309.

1957

ANGLO-SAXON PETROLEUM CO. LTD. *v.* ADAMASTOS SHIPPING CO. LTD.

had, i.e., as to the subject-matter of the description: see also *Day* v. *Trig.*[13] The doctrine of falsa demonstratio has no application here, because there is no conflict of descriptions and the parties' intentions are not clear.

The phrase "this bill of lading" is not appropriate in relation to a charterparty. The charterparty itself in clause 1 contains an express provision concerning bills of lading; therefore it is clear that the parties were contemplating that bills of lading would be issued. In these circumstances one cannot find a clear expression of common intention, so as to justify reading "bill of lading" as "charterparty" or striking it out from the clause paramount. If an owner wants to exempt himself from liability for unseaworthiness, then he must use very clear words. The court will not make a new contract for the parties: *per* Lord Wright in *W. N. Hillas & Co. Ltd.* v. *Arcos Ltd.*[14]; and if the Act is to be incorporated in the charterparty, then section 5 of the Act must be disregarded, which would be carrying out a major operation on the contract.

With regard to point (2) (supra), if the Hague Rules apply, they apply to cargo-carrying voyages. The words of Atkinson J. in *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[15] are relevant, because he thought that the exception in the Act would not apply before the goods were loaded, and said that the meaning of the Act could not be transmuted when it was put in a bill of lading. His view of damage to goods [16] is also relevant. In the House of Lords Lord Maugham, obiter,[17] said that Atkinson J. was right. If one is obliged to apply the Act to the charterparty, one cannot rewrite other parts of the Act or give them a different meaning. Section 2 of the Act can be applied to a cargo-carrying voyage. Therefore, the owners cannot say that on the voyage from Baltimore they were protected by section 4 (1) and (2) of the Act. If that be right, there is nothing in the clause paramount to protect the owners.

As to point (3) (supra), if the Hague Rules are applicable to the charterparty, do the words "loss or damage" in section 4 (1) and/or (2) of the Act relate only to physical loss or damage to goods: see *per* Atkinson J. in *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[18] and *G. H. Renton*

---

[13] (1715) 1 P.Wms. 286.

[14] 38 Com.Cas. 23, 37.

[15] [1940] 1 K.B. 812; 66 Ll.L.Rep. 147, 164.

[16] [1940] 1 K.B. 812, 839.

[17] [1942] A.C. 154, 175.

[18] [1940] 2 K.B. 812, 839; 66 Ll. L.Rep. 147, 164.

& Co. v. *Palmyra Trading Corporation of Panama.*[19] In the latter case it was held that the Carriage of Goods by Sea Act of Canada had no application, because it was not a case of loss or damage to goods. In the present case the Hagues Rules are limited to physical loss or damage to goods, and that does not cover the claim here, which was for lateness in tendering the ship to carry goods. *Hamilton & Co.* v. *Mackie & Sons* [20] is of assistance on all points. In *Thomas & Co.* v. *Portsea S.S. Co.*[21] the House of Lords regarded as insensible an arbitration clause in a charterparty written out in a bill of lading. This case should be treated in the same way—a clause paramount is written into a charterparty; the clause paramount says "this bill of lading"; therefore, it must be insensible.

Ashton Roskill Q.C. in reply. *Thomas & Co.* v. *Portsea S.S. Co.*[21] is distinguishable. The decision is only an application of the principle that where a bill of lading incorporates by general words, the provisions so incorporated are those to be performed by the consignee of the goods and such as are applicable to the character of the bill of lading. The arbitration clause is, therefore, struck out as inapplicable. Further, clear words are necessary to oust the jurisdiction of the court, and this cannot be done by putting a charterparty arbitration clause into a bill of lading. In this case the *physical* incorporation of the clause paramount is conclusive and disposes of the argument that the whole clause must be rejected as meaningless. "This bill of "lading" should be read as "this charterparty." As to the doctrine of falsa demonstratio, one should approach the construction of commercial documents with more generosity than the rules of construction used by equity lawyers. The court should be disposed to say that "this bill of lading" was intended by the parties to mean "this charterparty." The doctrine of falsa demonstratio should be applied here because both parties have incorporated the clause paramount in the charterparty in clear terms, and there is the clearest possible misdescription in the clause paramount.

As a matter of language the clause paramount is inappropriate to mean that the parties intended that any bills of lading issued under the charterparty should incorporate the provisions of the Act. There is nothing in the charterparty to justify the view that bills of lading as negotiable instruments were bound to be issued under it. The absence of a cesser clause is material and

[19] [1957] A.C. 149; [1956] 3 All E.R. 957.

[20] (1889) 5 T.L.R. 677.

[21] [1912] A.C. 1.

there is no form of bill of lading indorsed on the charterparty. There is no necessary implication in this charterparty that the master is bound to sign a bill of lading as a negotiable instrument. The word "herein" in the clause paramount cannot possibly be referring to a future document.

Cur. adv. vult.

Feb. 1. DEVLIN J. read the following judgment: On May 25, 1950, the charterers chartered a tanker belonging to the owners by a voyage charter which provided that it was to remain in force for as many consecutive voyages as the vessel could perform within a period of 18 months. The first voyage began on July 27, 1950, when the vessel left Baltimore in ballast to load her first cargo at Curaçao. On the way there she broke down and had to be taken in tow to Puerto Rico where repairs were effected. Other similar incidents occurred at different stages of her service and the result was that she lost in all 106 days. She was not on time charter so that no question of payment of hire arose; but as the result of the time lost she was able to complete fewer voyages than she would otherwise have done. The charterers claimed damages which they put at over £80,000, the claim being for the difference between the charter and the market rates of freight on cargo-carrying voyages which might have been performed within the 18 months if she had been continuously fit for service.

The claim went to arbitration and the investigation of it has already occupied a good deal of time. The umpire has now made an interim award on the question of liability, leaving the amount of damages to be determined hereafter. His findings, stated broadly, are that the breakdown of the vessel's machinery was due to the incompetence of the engine room staff, this incompetence amounting to unseaworthiness; but he found that due diligence had been exercised by the owners in the selection and appointment of the staff. In one instance, however, he found that the vessel was unseaworthy in respect of her machinery, and that due diligence had not been exercised to make her seaworthy. He has stated the question of law for the decision of the court in a form which I understand to have been requested by the parties, but which has not turned out to be a very useful one. The question is whether upon the facts that he has found, and upon the true construction of the charterparty, the owners are in breach of the charterparty in any one of ten respects thereafter particularized or on any other ground. The answer is that, by concession on the facts found, the owners are in breach on at least one ground; and, accordingly, I answer the question addressed to me in the affirmative and uphold the award.

When he comes to assess the damages the umpire will have to determine in which of the ten respects, or, put another way, for how much of the loss of time, he holds the owners responsible; and in making this determination some specific questions of law, which have already been argued before the umpire, will have to be decided. The most important of them is whether the owners are liable in respect of unseaworthiness which they exercised due diligence to prevent, and that in turn depends upon whether the United States Carriage of Goods by Sea Act was effectively incorporated in the charterparty. The main questions which the parties consider will have to be determined before the damages can be finally assessed have been agreed between them as follows: (1) Whether the United States Carriage of Goods by Sea Act (hereinafter called "the Act") affects the rights and liabilities of the parties under the charterparty. (2) If the answer to (1) is "Yes," whether under the charterparty any material provisions of the Act affect the rights and liabilities of the parties in connexion with (a) non-carrying voyages, (b) cargo-carrying voyages other than those to or from ports in the United States of America. (3) Do the words "loss or damage" in section 4 (1) and/or section 4 (2) of the Act relate only to physical loss of or damage to goods?

The proper way to raise these questions is by way of a consultative case stated under section 21 (1) (*a*) of the Arbitration Act, 1950. In order to avoid the necessity of an adjournment and a new statement of case I have agreed, at the request of both sides, to treat the case as if it contained these three questions stated as questions of law arising in the course of the reference; and I shall now proceed to answer them.

The United States Carriage of Goods by Sea Act, 1936, is the Act which embodies the Hague Rules, and it is on most points the same as the British Carriage of Goods by Sea Act, 1924. The Hague Rules, of course, apply only to bills of lading. Section 13 of the American Act, which is in the same terms as section 3 of the British Act, provides that every bill of lading which is within the Act shall contain a statement that it shall have effect subject to the provisions of the Act. The overriding clause which is put upon the bill of lading so that it may conform with this statutory provision is generally known as the clause paramount. Although the Hague Rules do not apply to charterparties, the parties to a voyage charterparty often wish to incorporate them. That is quite a general practice, well known to those sitting and practising in this court; and I observe that the practice is referred to in Scrutton on Charterparties, 16th ed., pp. 456 and 464. There appears to be no set form of clause for this purpose.

In this case what the parties have done is to provide by clause 52 of the charterparty, which is a typed clause, that certain sets of clauses such as the Chamber of Shipping war risks clauses, and so on, " are to be incorporated in this charterparty "; and included among those set out in clause 52 is the paramount clause. The parties have then attached the various sets of clauses which they want incorporated and they have attached a typed sheet headed " Paramount Clause " which sets out what is called the United States clause paramount, which will be found also printed in Scrutton, 16th ed., p. 464. It is in the following terms: " This bill of lading shall have effect subject " to the provisions of the Carriage of Goods by Sea Act of the " United States approved April 16, 1936, which shall be deemed " to be incorporated herein, and nothing herein contained shall be " deemed a surrender by the carrier of any of its rights or " immunities or an increase of any of its responsibilities or " liabilities under said Act. If any term of this bill of lading be " repugnant to said Act to any extent, such item shall be void " to that extent but no further." This method of incorporation, or attempted incorporation, of the Hague Rules seems also, as noted in Scrutton, p. 464, to be very common.

But the paramount clause begins with: " This bill of lading." The charterparty is, of course, not a bill of lading and the charterers, therefore, submit that the parties have failed to make their charterparty subject to the Act or to incorporate the Act in the charterparty. They say that " bill of lading " cannot be interpreted to mean charterparty and, therefore, that the whole clause must, if necessary, be disregarded and treated as meaningless. As a matter of interpretation of the words " bill of lading " this is undoubtedly right, but interpretation is not quite the same thing as construction. The true construction of a document may require the court to reject words which cannot be interpreted in a way which makes them consistent with the object of the parties. The object of clause 52 appears to me quite plainly to be to incorporate the clause paramount in the charterparty. I ought not to hold that they have failed in that object if there is any rule of construction which would enable me to give effect to it. I think there is such a rule in the principle falsa demonstratio non nocet. The paramount clause is to be treated just as if it were a typed clause in the charterparty. If it were, for example, clause 1, it would appear almost immediately under the heading of the document which is "Tank Vessel Voyage Charterparty," and would read: "This bill of lading shall have effect subject "to the . . . Act which shall be deemed to be incorporated "herein," that is, in this charterparty. Although it is contended that the clause might refer to bills of lading which might be issued under the charterparty, it is conceded that there was no bill of lading then in existence to which the clause could have referred. It seems to me to be plain, therefore, first, that it is the intention of the parties that "this" document in which the clause is contained is to be subject to the Act, and, secondly, that the provisions of the Act are to be incorporated in the same document: and that document is a charterparty. The case is not simply one in which the expression "This bill of lading" is inconsistent with the document into which the incorporation is to be made. If that were all, the clause paramount might, on the authority of *Hamilton & Co.* v. *Mackie & Sons*,[1] which I later consider, have to be disregarded. But as soon as the clause is written into the charterparty an inconsistency appears between two parts of the clause itself: "This bill of lading" and "herein" cannot stand together; one is false and one is true, and the principle, falsa demonstratio, can be used to determine which. I think that the description of the document as a bill of lading, which manifestly it is not, should be treated as falsa demonstratio. It is, of course, a very slapdash way of doing things. The parties would have done very much better to have noted the disapproval of the learned editors of Scrutton on Charterparties of the practice of frequently attaching the United States clause paramount to charterparties "for which it was clearly not originally intended" (16th ed., p. 456), and to have studied the particularly carefully drawn clause in *Minister of Food* v. *Reardon Smith*,[2] which the editors commend. They would thus have saved a good deal of argument and doubtless also some expense. But this court does not exist for the purpose of correcting the exercises of commercial men but for the purpose of giving effect to their intentions where it can penetrate to them through the very often dubious forms of words which they use; and in this case I have no doubt what the intention was. Of course, as the editors of Scrutton truly say, and as later parts of this judgment will make manifest, the result of the method chosen, the incorporation of the Act en bloc, must be very doubtful. But it is a method which is so common in the composition of commercial documents that the court has become used to doing its best to find the right solution. The conclusion I have reached is that the clause paramount is incorporated in the charterparty, treating it, as corrected, to read: "This charterparty is subject to, etc."

---

[1] (1889) 5 T.L.R. 677.

[2] [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265.

There arises next the question of incorporating the Act in the way in which the clause requires. The charterers submit that this cannot be done because of section 5, which says: "The provisions "of the Act shall not be applicable to charterparties." The way in which this sort of point should be dealt with has been decided by the Court of Appeal in *Hamilton & Co.* v. *Mackie & Sons*,[3] a decision which was approved in the House of Lords in *Thomas & Co.* v. *Portsea Steamship Co.*[4] In the former case the question related to the incorporation of charterparty terms in a bill of lading and Lord Esher M.R. said that the procedure to be followed was well settled.[5] "The conditions of the charterparty must be "read verbatim into the bill of lading as if they were there printed "in extenso. Then if it was found that any of the conditions "of the charterparty on being so read were inconsistent with the "bill of lading they were insensible and must be disregarded." Since the clause paramount says that this charterparty shall be subject to the Act, it is insensible to incorporate into the clause paramount a condition which says that the Act shall not apply to charterparties; and therefore section 5 must be rejected. I answer the first question addressed to me in the affirmative.

The material provisions of the Act, mentioned in the second question, I take to be a reference principally to section 4 (1); this is the section which gives the shipowner immunity for loss or damage arising or resulting from unseaworthiness unless caused from want of due diligence. It is convenient to take the second part of the question first, that is whether the immunity covers voyages other than those to and from American ports; for that point follows naturally on the one I have just been considering. There is a wide range of ports in the charterparty and if the immunity were to relate only to voyages to and from American ports, the effect of it would be considerably cut down. The basis for this contention is in the general provision at the beginning of the American Act in the following terms: "That every bill of "lading or similar document of title which is evidence of a "contract for the carriage of goods by sea to or from ports of

---

[3] 5 T.L.R. 677.

[4] [1912] A.C. 1.

[5] 5 T.L.R. 677.

"the United States, in foreign trade, shall have effect subject "to the provisions of this Act."

There is also to be considered section 13, which provides: "This Act shall apply to all contracts for carriage of goods by "sea to or from ports of the United States in foreign trade." Together with section 5 already quoted, these provisions define the sort of contracts to which the Act applies; it does not apply to charterparties, and it does apply to some, but not all, bills of lading. No part of these provisions can have application when the Act is applied to contracts outside its provisions, by virtue of a clause in the contract itself; and in particular the fact that the Act limits the categories of bills of lading to which it applies is no justification for saying that it applies only to a limited part of a charterparty. The extent of the application must be governed by the contract itself. I answer question 2 (b) in the affirmative.

The other part of this question inquires whether the immunity under section 4 (1) of the Act covers non-cargo-carrying voyages. This vessel was first found to be unseaworthy when she was on her voyage from Baltimore in ballast to her first loading port. This is the sort of voyage that is meant by a non-cargo-carrying voyage, and no doubt there were other similar voyages at a later stage of her service. Apart from the Act, the obligation expressed in clause 1 of the charterparty is that the said vessel "being "tight staunch and strong and every way fitted for the "voyage . . . shall with all convenient despatch sail and proceed "to" the loading port. That is an express and absolute warranty of seaworthiness covering the voyage from Baltimore and the question is whether it is displaced by the qualified warranty in the Act. Section 4 (1), which I have already quoted, and which confers the immunity when due diligence is proved, takes the reader back to section 3 (1), which is as follows: "The carrier "shall be bound, before and at the beginning of the voyage, to "exercise due diligence to (*a*) make the ship seaworthy; "(*b*) properly man, equip, and supply the ship; (*c*) make the "holds, refrigerating and cooling chambers, and all other parts "of the ship in which goods are carried, fit and safe for their "reception, carriage and preservation."

There can be no doubt that "the voyage" in this section, when it is incorporated in a bill of lading, means the cargo-carrying voyage. The bill of lading is not concerned with anything else; and the Act is concerned (see section 1 (*e*)) with the period beginning with the loading and ending with the discharging of the goods. The word "before" in this section is, I think, intended to cover the period of preparation for the voyage and cannot be extended to cover any earlier voyage. There can likewise be no doubt that "the voyage" in the charterparty, for example in clause 1, means the charterparty voyage, that is to say, it begins when the vessel proceeds to the port of loading. The question is therefore: when sections 3 and 4 are translated into the charterparty, does "the voyage" therein take on a different meaning and become the charterparty voyage so that the immunity attaches from the beginning of that voyage? Or does it take its original meaning with it so that the absolute warranty governs the voyage to the port of loading and the qualified warranty relates only to the cargo-carrying voyage? It would not be startling to find a change of warranty in this way. Voyage charterparties often contain a cesser clause and the result of that is that the bill of lading provisions often supersede the charterparty provisions, and if the bill of lading is subject to the Hague Rules the shipowner will find that his obligations are modified.

If "voyage" was expressly defined in the Act, Mr. Roskill, I think, concedes that it would carry its definition with it. But in the absence of express definition, its meaning has to be gathered from its context; and if the context is amplified, the meaning may be amplified also. In the context of a charterparty, "voyage" means charterparty voyage. That is certainly its meaning in clause 1 of the charterparty, and if section 3 (1) of the Act is written into the charterparty as some later clause, the "voyage" referred to in it must, prima facie, be considered to be the same voyage. This is a strong argument and for the purposes of this case I am prepared to assume that it is right. Nevertheless, the presumption that "voyage" has the same meaning throughout may have to yield to any special indication of meaning and, treating section 3 of the Act purely as a charterparty clause, I think that it does contain such an indication. Section 3 (1) (*c*) imposes on the shipowner the obligation to exercise due diligence to make the holds, etc., fit for the reception of cargo before and at the beginning of the voyage. If this obligation attaches at the time when the ship leaves in ballast for the port of loading, it would in many cases, probably in most, impose an unreasonable and unnecessary burden on the owner. It suggests very strongly that the voyage in this clause means the cargo-carrying voyage. If there are two possible meanings, I must have regard to the general principle that the express warranty of seaworthiness in clause 1 of the charterparty ought

1957

ANGLO-SAXON PETROLEUM CO. LTD. *v.* ADAMASTOS SHIPPING CO. LTD.

Devlin J.

to prevail except and in so far as it is clearly diminished. This well established rule was stated by Lord Wright M.R. in *Petrofina* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa*[6] as follows: "If it is sought to effect a limitation of the over-"riding obligation to provide a seaworthy ship (whether that is "express or implied for this purpose does not matter), by other "express terms of the charterparty or contract of affreightment, "that result can only be achieved if perfectly clear, effective and "precise words are used expressly stating that limitation." For these reasons I consider that question 2 (a) should be answered in the negative.

The last question asks whether the words "loss or damage" in section 4 (1) and (2) of the Act relate only to physical loss of or damage to goods. The words themselves are not qualified or limited by anything in the section. The Act is dealing with responsibilities and liabilities under contracts of carriage of goods by sea, and clearly such contractual liabilities are not limited to physical damage. A carrier may be liable for loss caused to the shipper by delay or misdelivery, even though the goods themselves are intact. I can see no reason why the general words "loss or damage" should be limited to physical loss or damage. The only limitation which is, I think, to be put upon them is that which is to be derived from section 2 which is headed: "Risks." The "loss or damage" must, in my opinion, arise in relation to the "loading, handling, stowage, carriage, custody, "care and discharge of such goods," but is subject to no other limitation. In *G. H. Renton & Co.* v. *Palmyra Trading Corporation of Panama*[7] the House of Lords held that the words "loss or "damage to or in connexion with goods" in article III, rule 8, of the Hague Rules were not limited to actual loss of or physical damage to the goods; and I should give the same meaning to "in relation to" as to "in connexion with."

In *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[8] Atkinson J. expressed obiter the view that article IV referred only to "damage to goods."[9] In the report in Lloyd's List Law Reports, which was cited to me, he is reported as saying "damages or injury to goods"[10]; I think it must be assumed that on revision he preferred the shorter phrase. In the House of Lords in the same case[11] Lord Maugham, also speaking obiter,[12] approved the view of Atkinson J. These dicta were relied on by Mr. Mocatta as furnishing authority for the view that the words in section 4 should be limited to physical loss or damage. In *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[13] the vessel, while waiting outside her loading port and before she became an arrived ship, sustained a serious boiler explosion with the result that the owners gave notice that they could not perform the charterparty. The charterers made a claim for damages for failure to load. The claim is not stated more precisely than that because the award with which the courts were dealing was an interim award on liability. Presumably, since no goods were on board or affected in any way, the claim can only have been based, as the claim in the present case apparently is, on a rise in freights. The charterparty incorporated the Hague Rules and it was in that connexion that the words "loss or damage" came to be considered as a very minor point in the case, the main point being frustration. Atkinson J. was not, therefore, considering a claim for delay in connexion with goods or anything of that sort. His opinion that the Act refers only to damage to goods must be considered in relation to the facts of the case, and does not, in my judgment, amount to authority for limiting the phrase to physical loss or damage. I therefore answer the third question in the negative.

---

[6] (1937) 42 Com.Cas. 286, 291.

[7] [1957] A.C. 149; [1956] 3 All E.R. 957.

[8] [1940] 1 K.B. 812.

[9] Ibid. 839.

[10] (1940) 66 Ll.L.Rep. 147, 165.

[11] [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165.

It will have been observed that the type of damage apparently claimed in *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[13] is not unlike the claim made in the present case. The parties did not, however, feel able to agree upon any form of question wider than the one I have just discussed and answered. I agree with that attitude. Until the nature of the damages claimed is fully investigated and determined, it is not possible to decide finally whether the damage is or is not "in relation to" the operations which are set out in section 2 and which I have quoted above.

But[14] both parties asked me to express, if I could, some indication of my view of the width of these words, since they thought that it might assist them. Phrases like "in relation to" and "in connexion with" are no doubt very wide, but the character of the compensation claimed must bear some relation to the goods and that relation must not be too remote. The claim in the present case appears to be for loss of services. If the charterer happens also to be the owner of the goods, a higher expenditure on freight may affect the future price of the goods or the profit on resale. But that is very remote. From what I understand at present of the nature of the loss or damage claimed, it seems to me to be unlikely that section 4 would apply to it. I have said as much as this because the parties asked me to and in the hope that it may assist them in diminishing the area of dispute between them and so save some part of the costs that may remain to be incurred.

---

[12] [1942] A.C. 154, 175.

[13] [1940] 1 K.B. 812.

[14] *Agreed statement.*—
February 5, 1957. *Ashton Roskill Q.C.* applied to Devlin J. for the purpose of referring to the concluding passage in the judgment of Devlin J., delivered on February 1, i.e., from the words "But both parties asked me to "express . . ." to the end of the judgment.
Counsel said that it had not been possible for him to be present when the judgment was delivered and that he wished to take the opportunity of drawing his Lordship's attention to the fact that he had not, as was suggested in the judgment, requested an

Award upheld.
Agreed questions of law answered as follows:
(1) *In the affirmative.*
(2) (*a*) *In the negative.*
(*b*) *In the affirmative.*
(3) *In the negative.*

P. P.

The charterers appealed, and the owners cross-appealed, both parties asking the court to answer all the questions of law raised in paragraph 56 of the award.

A. A. Mocatta Q.C. and *S. O. Olson* for the charterers. The court is asked to assist in finalizing long and expensive proceedings by answering all the questions of law raised on the award,

expression of view from his Lordship as to the scope of the words "in "relation to" in section 2 of the United States Carriage of Goods by Sea Act, 1936. Counsel reminded his Lordship that no submission had, during the argument, been made by either side as to the scope of these words or as to their applicability in relation to the facts of the case. The argument before his Lordship had, in all respects, been confined to the questions which his Lordship had agreed to answer, which were questions of law.

DEVLIN J. said that if he had realized, as he now did, that, notwithstanding Mr. Mocatta's suggestion that he might express a view as to the scope of the words "in relation to," the parties had not joined in this request, he would not have referred to the matter and that, in any case, his observations in this connexion were "very much obiter." Devlin J. asked both counsel to agree a statement to be included as an appendix to the transcript of the judgment and this statement was agreed pursuant to this request.

C. A.
1957

Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd.

despite the form of award in paragraph 58 which Devlin J. regarded as precluding him from considering the award after the owners had conceded that they were liable in one respect.

[Denning L.J. But the award is the subject of appeal here. We ought to consider it.]

On the first question, whether the United States Act, introduced into the contract by the paramount clause, affects the rights and liabilities of the parties under the charter, Devlin J.'s affirmative answer cannot be right. The Act does not apply as a matter of statute law and can only apply contractually. It is clear that, though the court must give effect to the clause if possible, any attempt to apply to a world-wide consecutive voyage charter of this kind the provisions of an Act designed for bills of lading in relation to contracts for the carriage of goods to or from ports in the United States—an Act, moreover, section 5 of which expressly says that it shall not apply to charterparties—is so impossible that the court would be forced into the position of trying to make a contract for the parties which they never intended to make.

Moreover, these owners seek to rely on the clause and the Act to excuse them from clearly found liability for an unseaworthy vessel and negligent servants. It is elementary law that an exceptions clause must be in clear words, and there is no such clarity here: *Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa*[1] and *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[2] If the parties had wished to incorporate the Hague Rules or the United States Act, they could have done so by words which would successfully have achieved that object: see the cases cited in Scrutton on Charterparties, 16th ed., p. 456—all significantly on single-voyage charters: *Leeds Shipping Co. Ltd.* v. *Duncan Fox & Co. Ltd.*[3]; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation*,[4] and *Minister of Food* v. *Reardon Smith Line Ltd.*[5] A clause which seeks to effect a general incorporation of the Rules or an Act in this way cannot affect the charter and should be rejected as insensible: *Hamilton & Co.* v. *Mackie & Sons*[6] and *Thomas & Co.* v. *Portsea Steamship Co.*[7] support that submission. The word "herein" in the clause requires that if the Act is written into the contract it must be the whole Act and not merely the provisions which are convenient to the party seeking to rely on it. Devlin J. was only able to say that the owners could rely on the Act by applying the doctrine of falsa demonstratio non nocet and reading the words "This bill of lading" as "This "charterparty." But the full maxim is "Mere false descrip- "tion does not vitiate, if there be sufficient certainty as to the "object": see Brougham's Legal Maxims, 10th ed., p. 426. There is no certainty here that the parties intended the Act to apply to the charterparty and not, as the words state, to "This "bill of lading": see Halsbury, 2nd ed., vol. 23, p. 133, para. 186. [*Tudor Accumulator Co. Ltd.* v. *Oceanic Steam Navigation Co. Ltd.*[8] and *Golodetz* v. *Kersten, Hunik & Co.*[9] were also referred to.]

---

[1] (1937) 53 T.L.R. 650, 653; 57 Ll.L.Rep. 247; 42 Com.Cas. 286.

[2] [1908] A.C. 16; 24 T.L.R. 114.

[3] (1932) 42 Ll.L.Rep. 123; 37 Com.Cas. 213.

[4] [1942] A.C. 154; 67 T.L.R. 485; [1941] 2 All E.R. 465.

[5] [1951] 2 T.L.R. 1158; [1951] 2 Ll.L.Rep. 265.

[6] (1889) 5 T.L.R. 677.

[7] [1912] A.C. 1.

It is tentatively suggested that by this clause the parties intended that (*a*) if any bills of lading were issued under the charterparty they would incorporate the Hague Rules, or (*b*) if bills of lading so issued contained the common clause "all other "terms and conditions as per charterparty," the paramount clause would then come into its own; but there are no express words to that effect in this charter.

If the Act applies, the questions arising are the extent of the owners' obligation in regard to the seaworthiness of the vessel before and at the beginning of, and during the course of (i) the non-cargo-carrying voyage from Baltimore to Curaçao; (ii) the cargo-carrying voyage other than to or from ports in the United States; (iii) the voyage with a cargo of fresh water; and (iv) the cargo-carrying voyage to a port in the United States.

On the first of those questions Devlin J. rightly held that the Act did not apply to non-cargo-carrying voyages and therefore the owners are not protected against their initial breach of the express warranty of seaworthiness in clause 1 at Baltimore and the negligence between Baltimore and Curaçao—a non-cargo-carrying voyage. The judge's analogy with a cesser clause was sound, showing that it is not unknown for the liability of owners to change during the course of a voyage. The "voyage" to which the Act applies must be one within section 2 "in relation "to the loading," etc., of goods. The owners cannot strike out section 2 as inapplicable, for section 3 cannot stand by itself, and by subsection (1) of section 3 the carrier has to exercise due diligence "before and at the beginning of the voyage." What is the owners' obligation under that subsection in this charterparty? If they have to exercise due diligence at the beginning of each voyage, whether in ballast or in cargo, throughout the duration of the charter, that is damaging to the owners' contention that the "voyage" under this charter is just one voyage. If it is said that they need only exercise due diligence once, that is another good reason for rejecting the paramount clause as inapplicable to a consecutive voyage charter which expressly requires the vessel to be "maintained," for the Act says nothing about maintenance.

---

[8] (1924) 41 T.L.R. 81; 20 Ll.L. Rep. 106.

[9] (1926) 24 Ll.L.Rep. 374.

On the second of those questions, if the Act applies, it applies only to the voyages carried out under this charterparty to or from ports in the United States and to no other voyages, for nothing in the contract says that the Act's protection is to extend to voyages which the Act by its preamble and the terms of section 13 does not cover.

The next question arising is the meaning of the words "loss "or damage" in section 4 (1) and (2) of the Act; it is submitted that they relate only to loss or damage to goods and are in any event not wide enough to cover the loss here claimed. Devlin J.'s dictum, obiter, was right, namely, that the damages here claimed were too remote to be "in relation to" loading, etc., in section 2, which is the crucial section of the Act. The rights given in section 4 must apply to something, and section 2 states to what they are to apply, so that whatever limitation there is in "in "relation to" in section 2 applies to the words under consideration in section 4. This Act uses a wide variety of expressions in referring to "loss or damage" and, where a meaning wider than physical loss or damage is intended, words are used indicating that wider meaning. The dictum, obiter, of Atkinson J. in *Imperial Smelting Corporation* v. *Joseph Constantine Steamship Line Ltd.*[10] that similar words in the Australian Carriage of Goods by Sea Act, 1924, Sch., Art. IV (2) (*a*), were limited to physical loss or damage (approved, obiter, by Lord Maugham in the same case in the House of Lords[11]) is relied on. Lord Morton's consideration of "loss or damage to or in connexion with goods" in Article III, rule 8, of the Hague Rules, in *G. H. Renton & Co.* v. *Palmyra Trading Corporation of Panama*,[12] is distinguishable.

---

[10] [1940] 1 K.B. 812, 839–840; 66 Ll.L.Rep. 147; [1940] 2 All E.R. 46.

[11] [1942] A.C. 154, 175.

[12] [1957] A.C. 149, 168, 169; [1956] 3 All E.R. 957.

[DENNING L.J. That does not help much, for the words are so different from these. Have the courts in the United States considered these words?]

Not so far as counsel can discover. But if the court holds that the paramount clause is here insensible, the meaning of these words, though of general importance, will not arise for consideration in the present case.

If the Act does not apply, the owners have no exceptions clause available on the facts, and are liable for any loss or damage which was occasioned by the unseaworthiness of the vessel resulting from the incompetence of the staff at Baltimore, for all the troubles flowed from that initial breach. The express warranty of seaworthiness in clause 1 is that the vessel shall be "tight, staunch and strong," etc.: see *New York and Cuba Mail Steamship Co.* v. *Eriksen and Christensen.*[13] That warranty covers the provision of a competent staff as well as the physical state of the ship. There is no authority on this, but if the express words do not include competent manning in "seaworthiness," there is such an implied obligation at common law.

The obligation "to be maintained in such condition during "the voyage" is an obligation to keep the vessel in the same seaworthy condition throughout the charterparty period, subject to the one exception "perils of the sea," which is a proper exception to an absolute and continuing obligation. The word is "maintained" and not "restored." *Tynedale Steam Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co. Ltd.*[14] and *Giertsen* v. *Geo. V. Turnbull & Co.*[15] are distinguishable.

On "all convenient despatch" the obligation is express, and when read with clause 43 (which requires as many voyages to be performed as it is possible to fit into the 18 months, consonant with the exercise of due diligence and unless protected by exceptions) means that the owners shall so proceed throughout the whole period of the charter. If the obligation has to be implied, it is well established at common law that owners cannot loiter on a voyage and then plead that they are not liable because they have not caused the charterers any damage: see *The Wilhelm.*[16] The charterers claim that they ought to have had more voyages than they had in the 18 months.

The owners are also under an implied duty to exercise reasonable care and skill throughout the charter period, and so are throughout vicariously liable for their servants' negligence. They cannot say that they are only liable for negligence when carrying cargo and not for the loss caused by negligence which is claimed here. The charterers can claim for all loss of the vessel's services, because it all flowed from the initial unseaworthiness at Baltimore: see *The Christel Vinnen.*[17] There is nothing novel in the type of damages here claimed: see the note by Scrutton L.J. himself in Scrutton, 16th ed., p. 439, that "the measure of "damage is the market value of the ship to the charterer at the "time she should have loaded." All the questions asked by the umpire should be answered in the affirmative.

---

[13] (1922) 27 Com.Cas. 330.

[14] (1936) 52 T.L.R. 304; [1936] 1 All E.R. 389; 41 Com.Cas. 206.

[15] 1908 S.C. 1101.

[16] (1865) 14 L.T. 636.

Ashton Roskill Q.C., *T. G. Roche Q.C.* and *Basil Eckersley* for the shipowners. The court will hesitate long before rejecting as meaningless what businessmen have put into their contracts deliberately, and will not give an overstrict construction to commercial documents: see *per* Lord Wright in *W. N. Hillas & Co. Ltd.* v. *Arcos Ltd.*[18] and *per* Harman J. in *Treseder-Griffin* v. *Co-operative Insurance Society Ltd.*[19] The paramount clause is incorporated into this contract as a typed clause with specific intention, which requires the words "This bill of lading" to be construed as "This "charterparty": see Scrutton, 16th ed., pp. 456n. and 464, that a paramount clause in this form is frequently attached to charterparties. The protection of the Hague Rules in a long-term charterparty like this is just what the parties would be anxious to obtain, and by this paramount clause they have incorporated into their contract as contractual terms the provisions of the Act so far as they are sensible of incorporation. The word "herein" shows the true identity of the subject-matter as being the charterparty, and Devlin J. correctly invoked the doctrine of falsa demonstratio.

[SELLERS L.J. But there is a limit to the concessions which the court should make to the slapdash methods of businessmen. The parties must surely be presumed to know what is in the Act and that it is "not applicable to charterparties."]

What is not capable of incorporation should be struck out; and here the preamble and sections 5 and 13 can be disregarded as insensible: compare analogous operations in *Thomas & Co.* v. *Portsea Steamship Co.*[20]; *per* Lord Esher in *Serraino & Son*

---

[17] [1924] P. 208, 214; 40 T.L.R. 845.

[18] (1932) 38 Com.Cas. 23, 36; 43 Ll.L.Rep. 339.

[19] [1956] 2 Q.B. 127, 160; [1956] 2 All E.R. 33.

[20] [1912] A.C. 1.

v. *Campbell*,[21] and *Aktieselskabet Ocean* v. *B. Harding & Sons Ltd.*[22]

[PARKER L.J. It is not difficult to reject a whole provision; but if section 2, for instance, is to fit into this contract, it will have to be carved up and have its wording altered.]

Possible difficulties of construction afford insufficient reason for rejecting part of a contract as meaningless.

The paramount clause, it is submitted, was not intended to apply only to bills of lading issued under the charterparty, for the charterparty does not contemplate the issue of bills of lading as negotiable instruments.

Devlin J.'s holding that non-cargo-carrying voyages were outside the protection of the Act was wrong, for it involved giving two constructions to "voyage": (1) as it appears in clause 1, and (2) as it is used in the Act construed contractually. That cannot be right, for the same word in the same document must be given the same meaning. If the Act applies, it applies at all times throughout the charter period. "Voyage" in a charterparty means the charterparty voyage, which begins when the vessel breaks ground: see *Bruce* v. *Nicolopulo*[23] and *Barker* v. *M'Andrew*.[24] The judge's analogy with a cesser clause is unsound, for such a clause involves a shifting of liability once for all, whereas on his view there would be a continual shifting of rights and liabilities under the Rules according to whether or not the vessel was carrying cargo. That would gravely complicate commercial practice.

[PARKER L.J. The words of section 2 do seem to limit the "voyage" to a cargo-carrying voyage, for the responsibilities and immunities attach only "in relation to the loading," etc., of goods in the section. It is all so artificial, for the words of section 2 are applicable to a bill of lading.]

But when the vessel sets out in ballast for the first port of loading, it is doing something "in relation to" the loading, etc. It is under a contract of carriage and not on a frolic of its own. This charterparty is as much a contract for the carriage of goods as is a bill of lading.

As to the protection of the Act extending to voyages other than those to or from ports in the United States, Devlin J.'s reasons for treating section 13 as insensible in this contract are correct, namely, that there is a wide range of ports in this charter, and if immunity was limited as in clause 13 the paramount clause would be considerably cut down.

---

[21] [1891] 1 Q.B. 283, 289; 7 T.L.R. 174.

[22] [1928] 2 K.B. 371; 30 Ll.L.Rep. 249; 33 Com.Cas. 277.

[23] (1855) 11 Exch. 129.

[24] (1865) 18 C.B.N.S. 759.

[Denning L.J. That submission would be good if the charterparty itself had not contemplated any voyages to or from United States ports. But it does include such voyages.]

Once the Act is introduced contractually it must be construed with reference to the other provisions of the charterparty, including the wide trading limits. Moreover, section 13 does not state that the Act shall apply " only " to contracts of carriage by sea to or from United States ports.

" Loss or damage " in section 4 (1) and/or (2) of the Act is not limited to physical loss, but the words, which are quite general, are apt to cover, e.g., the loss of a market: see Scrutton, 16th ed., p. 484. The acts here alleged to be breaches were " in " relation to " one or more of the main duties in section 2, and the owners are protected because they exercised the due diligence which the Act requires.

The only express warranty of seaworthiness in this charterparty is that in clause 1, which is in print, and the qualified protection of the Act is sufficient to overrule that express warranty. If there is an inconsistency between the Act (or the Rules) and the warranty, the Rules prevail over the express warranty because they must be deemed to be written into the charterparty. But the two can be married if, as is submitted, the express warranty of seaworthiness applies only to the physical state of the vessel at the date of the charterparty and not to its competent manning. Though competent manning is part of seaworthiness, it is so by implication only. If that submission is correct, there was no breach of the express warranty at Baltimore, and the owners can rely on the Act in relation to the subsequent voyage.

If the Act does not apply, the owners' obligation to maintain in clause 1 is a qualified obligation to take reasonable steps to restore efficiency if anything goes wrong; it is not a continuing absolute obligation to ensure that nothing ever goes wrong; the exception of " perils of the sea " is not enough to make it an absolute obligation. There are two conflicting authorities on " maintenance ": *Tynedale Steam Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co.*[25]—which supports the submission for the owners—and *Minister of Materials* v. *Wold Steamship Co. Ltd.*,[26] in which a dictum, obiter, of Sellers J. was that an obligation

---

[25] 52 T.L.R. 304.

[26] [1952] 1 Lloyd's Rep. 485.

"so to be maintained" was a continuing warranty of seaworthiness throughout a charterparty.[27] In *Giertsen* v. *George V. Turnbull & Co.*,[28] which has stood in Scots law since 1908, it was held that in a time charter there is no continuing obligation to maintain in a seaworthy condition: see also Scrutton, 16th ed., p. 101, and Carver, Carriage of Goods by Sea, 9th ed., pp. 246 and 265, that "the implied warranty of seaworthiness under a "time charter must be complied with at the beginning of the "period of hiring, but does not arise afresh at the commencement "of each subsequent voyage." There is no reason for applying one rule as to maintenance in a time charter and another in a voyage charter.

With regard to "all convenient despatch," the only express provision is that the vessel shall so sail "to Curaçao" in clause 1. Though it is conceded that that must be read with clause 43 providing that the charterparty "shall remain in force for as "many voyages for which vessel can tender" over 18 months, the 18 months merely fix the date by which the last voyage is to be completed. Nothing in the contract entitles the charterers to claim for time lost. The obligation on the owners to perform "with all convenient despatch" is express only so far as the first of a number of separate self-contained cargo-carrying adventures is concerned; thereafter it is at its highest no more than an implied obligation attaching to each separate cargo-carrying adventure. There is no obligation on the owners so to perform the series of voyages contemplated by the contract as to give the charterers the use of the vessel for every moment of the 18 months. "Can tender" means "can tender in all the "circumstances."

On the claim which alleges vicarious negligence, there are no reported decisions to assist the court on the duty in consecutive voyage charters to take reasonable care and skill; but on general principles there is no room for the implication in a contract of this kind of a term that the owners are under a continuing vicarious obligation to the charterers.

[SELLERS L.J. Suppose that the chief engineer never got his engines running more than half-speed through negligence, so that only half the number of possible voyages was performed?]

The question could then be what damage the charterers sustained in connexion with each voyage. The obligation is limited to the particular cargo-carrying voyage in which the

---

[27] [1952] 1 Lloyd's Rep. 485, 496–497.

[28] 1908 S.C. 1101.

C. A.
1957

ANGLO-SAXON PETROLEUM CO. LTD. v. ADAMASTOS SHIPPING CO. LTD.

breach occurs. The questions formulated by the umpire should all be answered in the negative, save in the one respect of failure to repair at San Juan which was conceded by the owners.

Mocatta Q.C. replied.

Cur. adv. vult.

April 16. The following judgments were read.

DENNING L.J. said that the task of the court was to construe the charterparty, which was neither a time charter nor a single voyage charter, but a consecutive voyage charter. His Lordship stated the facts set out above, and continued: The findings of the umpire show that the root trouble was the incompetence of the engine-room staff. The owners at all times exercised due diligence properly to man the ship. They believed that they had appointed competent men at the start and, when the troubles arose, they made changes. For instance, they made changes in the engine-room staff at San Juan and at Buenos Aires; but still the staff remained incompetent until November 30, 1950, when the whole lot were changed at Curaçao on the way back. The charterers say that, as a result of these troubles, they lost the services of the vessel for 106 days: and, inasmuch as freight rates rose much during the period of the charter, they have lost over £80,000 on this account. The owners deny liability. They contend that their only obligation was to exercise due diligence themselves personally and they have done it.

On one matter, however, the owners admitted liability. Having regard to the findings of the umpire, they admitted that repairs were not properly executed at San Juan, with the result that there was leakage from the boilers on the way to Recife, for which they are liable: but they say that that was a comparatively minor matter, because the machinery was all properly repaired at Recife. The judge thought that, in view of the way the umpire had phrased paragraph 58 of his award, this admission of the owners left him (the judge) with nothing to do but to affirm the award; but, at the request of the parties, he answered three questions as if they had been asked by the umpire. I cannot help thinking that the judge construed the award with too rigid an eye. The umpire stated the questions of law very clearly in paragraph 56 of his award and I think we should do our best to answer them.

The real question is whether the incompetence of the engine-room staff and consequent damage to the machinery and delay to the vessel was a breach of the terms of the charterparty. Unless the owners are protected by the exempting clauses, I think they were clearly in breach of the charterparty on any one or more of the following grounds: (i) The owners were under an express or, alternatively, an implied obligation to ensure that the vessel was in seaworthy condition at the beginning of each successive voyage, that is to say, when she sailed from Baltimore on July 27, from Curaçao on August 19, and from Buenos Aires on October 5, 1950. (*Giertsen* v. *Geo. V. Turnbull & Co.*[1] concerned a time charter which is different.) In fact, this vessel was not seaworthy at any of those points because she was not manned by a competent engine-room staff. (ii) The owners were under an express obligation to maintain the vessel in a seaworthy condition during each of the successive voyages, perils of the sea excepted. Their obligation was, I think, an absolute obligation to ensure that the vessel was throughout in a seaworthy condition, save only when the vessel was rendered unseaworthy by perils of the sea, or perhaps by any of the excepted perils in clause 9. The introduction of the exception "perils of the sea" would be meaningless unless the obligation to maintain was an absolute obligation to ensure that the vessel remained efficient. (The case of *Tynedale Steam Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co.*[2] depended on the particular words of that charterparty.) This obligation to maintain was broken by the fact that the machinery broke down on the voyages from Baltimore to Curaçao, from Curaçao to Recife, and from Buenos Aires to Curaçao. None of those breakdowns were due to perils of the sea, but to the incompetence of the engine-room staff. (iii) The owners were under a duty to carry out their part of the contract with reasonable care and skill. They failed in that duty by the incompetence and consequent negligence of the engine-room staff. (iv) The owners were under an express or, alternatively, an implied obligation to sail and proceed with all convenient dispatch to the nominated port of loading for each successive voyage and to proceed upon and complete such voyage with all reasonable dispatch. They broke this obligation by the delays which took place unless they can show some just cause or excuse for them.

Such being, prima facie, the obligations of the shipowners, the question is whether they are saved by the exempting clauses of the charterparty. There is an exempting clause 9 which exempts the shipowners from liability, inter alia, for "perils of "the sea," "accidents of navigation even when occasioned by "negligence," and from "any latent defect in the machinery "not resulting from want of due diligence." This clause does not avail the shipowners, because the trouble was not due to "perils of the sea," the accidents were not "accidents of "navigation," and the defects in the machinery were not "latent." In these circumstances, the shipowners fall back on the "paramount clause" which was expressly incorporated in the charterparty and annexed to it by a typed slip in these words: "Paramount clause. This bill of lading shall have effect "subject to the provisions of the Carriage of Goods by Sea Act "of the United States, approved April 16, 1936, which shall be "deemed to be incorporated herein, and nothing herein contained "shall be deemed a surrender by the carrier of any of its rights "or immunities or an increase of any of its responsibilities or "liabilities under said Act. If any term of this bill of lading be "repugnant to said Act to any extent, such term shall be void "to that extent, but no further."

---

[1] 1908 S.C. 1101.

[2] 52 T.L.R. 304; [1936] 1 All E.R. 389; 41 Com.Cas. 206.

It is a strange thing to find a shipowner relying on the paramount clause to exempt himself from liability. Historically, its purpose was to make him liable. Shipowners used to insert clauses in bills of lading exempting themselves from all liability, no matter how much they or their servants were at fault. The purpose of the Hague Rules, speaking broadly, was to prevent shipowners from availing themselves of all these wide exemptions and to render them liable for want of due diligence to make the ship seaworthy and other matters: but, so long as they used due diligence in these regards, they were relieved from liability for subsequent negligence of their servants in the navigation or in the management of the ship. These rules have been given the force of law for outward bills of lading from England by the Carriage of Goods by Sea Act, 1924, and in carriage of goods to or from the United States by the United States Carriage of Goods by Sea Act, 1936. When a paramount clause is incorporated into a contract, the purpose is to give the Hague Rules contractual force: so that, although the bill of lading may contain very wide exceptions, the rules are paramount and make the shipowners liable for want of due diligence to make the ship seaworthy and so forth. We had an example of this last year in *Stafford Allen & Sons Ltd.* v. *Pacific Steam Navigation Co.*[3]

---

[3] [1956] 1 W.L.R. 629; [1956] 2 All E.R. 716; [1956] 1 Lloyd's Rep. 496.

In the present case, the shipowners seek to turn a paramount clause to their own advantage. They seek to use it to exempt themselves from liability: and they do it, not in a bill of lading for which it was designed, but in a charterparty. Although the charterparty on its true construction puts them, as I think, under an absolute obligation to provide a seaworthy ship (without any exception to avail them), nevertheless the shipowners say that the paramount clause cuts this down to an obligation only to exercise due diligence to make the ship seaworthy: and, as the umpire has held that they exercised due diligence, they say they are not liable. Again, although the charterparty on its true construction leaves them liable for the neglect and defaults of the engine-room staff in the management of the ship, nevertheless the shipowners say that the paramount clause relieves them from responsibility for loss or damage arising or resulting from it.

There is no doubt that the paramount clause is incorporated into the contract. It is so expressly by clause 52 and it is one of the contract documents. But what does it mean? It is useless to ask what was the intention of the parties, because I do not suppose they brought their minds to bear on it at all. It looks as if they pulled a common form of paramount clause out of the drawer and pinned it to the charterparty without reading it. How otherwise can anyone explain the opening words "This bill of lading" when it was not a bill of lading at all but a charterparty? And it is quite certain that the parties did not read the provisions of the Carriage of Goods by Sea Act of the United States (which is deemed to be incorporated), for, if they had, they would have seen that it says that "the provisions of "the Act shall not be applicable to charterparties." What, I ask, is the use of incorporating into a charterparty an Act which says that it is not to apply to charterparties? It simply does not make sense. We are aware, however, that a paramount clause in these words is often attached to charterparties in the very way it was done in this case: see Scrutton on Charterparties, 16th ed., pp. 456 and 464. Let us, therefore, try to make sense of the clause and give some meaning to it without relying on the phantom guide of the intention of the parties. As soon as we do this, we find that we have to put our English language to the most uncomfortable contortions and distortions. I will state some of them. (i) We must strike out the words "bill of lading" in the paramount clause and write "charterparty" instead. (ii) We must then treat the Carriage of Goods by Sea Act of the United States as if it were written into the charterparty; and, having done that, we must strike out, as it were with a blue pencil, the words "The provisions of the Act shall not be "applicable to charterparties." Those operations are drastic enough, but they are simple compared with the problems that remain. (iii) There is a provision in the Act which says that "This Act shall apply to all contracts for carriage of goods by sea "to or from ports of the United States in foreign trade." Are we to strike out the words "to or from ports of the United States in "foreign trade"? I do not quite know why we should strike out those words, but on the other hand it seems rather absurd to incorporate them into this charterparty. It is a world-wide charterparty and, if the paramount clause is to apply, one would think it should apply throughout the contract of carriage. It would be strange if the shipowners are not liable for the negligence of the engine-room staff on the voyage from Baltimore to Curaçao, but are liable for their negligence on the voyage from Curaçao to Buenos Aires. To remove this strangeness, we would have to say, as the judge has done, that the words "to or from "ports of the United States in foreign trade" are inapplicable to this contract. (iv) The Act only applies to contracts for the carriage of goods, and the term "carriage of goods" is defined to cover "the period from the time when the goods are loaded "on to the time when they are discharged from the ship." This provision is intelligible enough in regard to a bill of lading, but it leads to incongruous results when it is sought to apply it to this charterparty. If it is incorporated literally into the charterparty, it means that the paramount clause does not apply to all the voyages under the charter, but only to the cargo-carrying voyages. It does not apply, therefore, to the voyage from Baltimore to Curaçao, but it does apply to the voyage from Curaçao to Buenos Aires. This seems odd. One would have thought that the shipowner would be liable for the negligence of his engine-room staff on both voyages or on neither. The judge has felt unable to remove this odd result. He has said that the Act applies to the cargo-carrying voyages but not to the others. (v) The Act, in section 4 (2) (*a*), exempts the shipowners from liability "for loss or damage" arising or resulting from the neglect of the staff in the management of the ship. In a bill of lading this exemption is intelligible. It exempts the shipowner from loss or damage in relation to the loading and handling of the goods and so forth: see section 2 of the Act. But how is this to be applied to this charterparty, and in particular to the claim in this case where there is no loss or damage in relation to goods, but only loss of service of the vessel? The judge seems to have thought such loss was not covered by the Act, so that the shipowners remained liable despite the paramount clause. I should have thought that if this clause is to be applied so as to protect the shipowners under a charterparty, the parties would intend it to protect the owners from a claim for loss of services.

All these problems arise, of course, from the fact that the parties inserted this paramount clause (which is designed for a bill of lading) without giving a thought as to whether it could be sensibly applied to a charterparty. They now present it to this court and ask us to make sense of it. The answer is that we cannot. If we seek to incorporate the Act, or, as I prefer to put it, the Hague Rules, and read the words literally, we find the parties say at one and the same time that the Hague Rules are to apply and yet are not to apply. If we reject the obvious contradictions and inconsistencies, and seek to apply the rest of the Hague Rules in their ordinary meaning, we are left with such incongruous results that no one can suppose that the parties ever intended to produce them. If we reject the contradictions, inconsistencies and incongruities, and put something in their stead, we shall be making for the parties a contract which we may think is reasonable but to which they have never subscribed, because it would bear no relation to the written words. And I have good reason for thinking that we might differ from the judge, and between ourselves, as to what would be reasonable. This all leads me to the conclusion that this paramount clause cannot sensibly be applied to this charterparty. It must be rejected as insensible in this setting: see *Nicolene Ltd.* v. *Simmonds*.[4] I would emphasize the setting. This is an attempt by the shipowner to escape from liability which otherwise would be imposed upon him by his contract and by the law. We have repeatedly refused to allow a party to a contract to escape from his just liability under it by reason of an exempting clause, unless he does so by words which are perfectly clear, effective and precise: see *Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa*.[5] The shipowners' claim to exemption fails on that ground if on no other. I would answer each of the questions asked by the umpire in paragraph 56 (1) to (10) by saying Yes.

---

[4] [1953] 1 Q.B. 543; [1953] 1 All E.R. 822.

[5] (1937) 53 T.L.R. 650; 57 Ll.L. Rep. 247; 42 Com.Cas. 286.

C. A.
1957

Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd.

Parker L.J. I agree. This case raises difficult questions of construction, but first it is necessary to ascertain what are the contract documents. These consist of (1) the printed form dated May 25, 1950, signed by the parties and headed "Tank Vessel "Voyage Charterparty," (2) the typed clauses 24 to 52 attached which are expressly incorporated by the provision at the foot of the printed form, (3) the named clauses referred to in clause 52 and attached—these include the paramount clause—and (4) the addendum made on May 26, 1950.

It is clear, therefore, that the paramount clause forms part of the contract, just as if it was set out therein as a numbered clause. It purports in turn to incorporate the provisions of the Carriage of Goods by Sea Act of the United States, and, accordingly, it is contended that the provisions of that Act are also incorporated in the contract and form part of the contract documents. But before that can be said to be the effect of the clause, I think it falls to be construed. Thus, the clause begins "This bill of lading" and it is into "this bill of lading" that the provisions of the Act are incorporated. It further provides that "If any term of this bill of lading be repugnant to said Act "to any extent, such term shall be void to that extent, but no "further." Accordingly, the provisions of the Act are only incorporated into the contract and only prevail over any term of the charterparty repugnant to such provisions if, as a matter of construction, it is permissible to read "This charterparty" for "This bill of lading" throughout the clause.

Again, even if it is permissible to do this, it is clearly necessary to read in some words of limitation into the clause. The provisions of the Act are designed to apply to bills of lading. The Act expressly provides that they shall not apply to charterparties. They are designed to apply and are only apt to apply to a single cargo-carrying voyage. They are quite inapt to apply to successive charterparty voyages. The Act expressly provides that they shall not apply except in the case of contracts of carriage by sea to or from ports of the United States in foreign trade, whereas this is a world-wide charter. Accordingly, it would be necessary to imply some term into the clause limiting the provisions of the Act that are to be incorporated as contract terms.

The above remarks are sufficient to show the difficulties in construction which arise. The parties have, however, agreed to the incorporation of the clause into a commercial document, and the court, where it is possible, should resolve those difficulties according to recognized rules of construction. Only in the last resort will the court recognize defeat and disregard as nonsense what commercial men have agreed upon. The parties may well have intended that the Hague Rules should apply; but have they expressed that intention in the words used? They have not done so in clear words. At the best, they have done so only, as the judge said, in a slap-dash way. At the worst, they have expressed themselves in such ill-thought-out terms that it is impossible to feel sure what they intended. As is pointed out in Scrutton on Charterparties (16th ed.) at pp. 456 and 464, parties often do incorporate provisions of an Act which embodies the Hague Rules: see *Leeds Shipping Co. Ltd.* v. *Duncan Fox & Co. Ltd.*,[6] and *Minister of Food* v. *Reardon Smith Line Ltd.*[7] In all cases which have come before the courts, however, the parties have, so far as I can ascertain, identified the provisions they intended to apply and have provided that "This charter-"party shall be deemed to be a contract for the carriage of "goods by sea to which" the provisions in question shall apply. This is the first case which has come before the courts in which this clumsy method has been adopted of simply incorporating the paramount clause.

Clearly this clause read literally as a term of the charterparty is nonsense. It was suggested by Mr. Mocatta that it could be read as applying to bills of lading issued under the charterparty, but the short answer is that it does not say so. He also suggested that it was inserted in the expectation that any bill of lading issued under the charterparty would contain a provision that all other conditions were to be as per charterparty; but I cannot accept that as a possible reason. For myself, however, I would be prepared to read "this bill of lading" as "this charterparty" if thereby certainty as to intention could be discovered. And, if this were done, I would go further and strike out as insensible the provision of the Act which excluded charterparties. But it is at that stage that, as I think, the difficulties become unsurmountable. What provisions are to be treated as incorporated? This charter is, as I have said, for successive charterparty voyages and world-wide in its scope. It is clearly not possible to select those provisions which the court thinks reasonable to apply in all the circumstances. That would be to make a new contract between the parties. The only safe method of exclusion would be to reject only those provisions or parts of provisions which would be insensible. But, if this is done, one is left with such a jumble of provisions that it is, in my judgment, quite impossible to feel sure what the parties intended. Accordingly, I feel constrained to reject the whole of the paramount clause as insensible.

---

[6] (1932) 42 Ll.L.Rep. 123; 37 Com.Cas. 213.

[7] [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265.

Moreover, the owners are trying to invoke this clause to exempt themselves from the warranty of seaworthiness. To achieve that result clear, effective and precise words are required: see Lord Wright in *Petrofina S.A. of Brussels* v. *Compagnia Italiana Trasporto Olii Minerali of Genoa.*[8] In my judgment, the paramount clause as incorporated in the charterparty fails to achieve that result. I think that the words of Lord Loreburn in *Nelson Line (Liverpool) Ltd.* v. *James Nelson & Sons Ltd.*[9] are very much in point. He said[10]: "But in "truth I think the clause, taken as a whole, so ill thought out "and expressed that it is not possible to feel sure what the "parties intended to stipulate. The law imposes on shipowners "a duty to provide a seaworthy ship and to use reasonable care. "They may contract themselves out of those duties, but unless "they prove such a contract the duties remain; and such a "contract is not proved by producing language which may mean "that and may mean something different"; and he added: "I am afraid it is useless to draw the attention of commercial "men to the risks they run by using confused and perplexing "language in their business documents. Courts of law have no "duty except to construe them when a question arises; but it is "often very difficult. And sometimes what the parties really "intended fails to be carried out because ill-considered expres- "sions find their way into a contract."

In the result, I find it unnecessary to deal with the other points dealt with by the judge on the basis that the provisions of the Act are incorporated. There remain, however, certain other points which have to be determined, and I can give my views quite shortly. (1) This is not a time charter but a charter for successive voyages. In these circumstances, I think that the obligation to provide a seaworthy vessel applies at the commencement of each of the charterparty voyages. I agree with the umpire on this point. (2) Even if I am wrong in the above, I think that the obligation to maintain in clause 1, which extends over the whole period of the charter, amounts to an undertaking that the vessel would remain tight, staunch and strong and in every way fitted for the successive voyages, "perils of the sea

---

[8] 53 T.L.R. 650; 42 Com.Cas. 286.

[9] [1908] A.C. 16; 24 T.L.R. 114.

[10] [1908] A.C. 16, 19–20.

"excepted." The nature of the obligation to maintain must depend on the exact words used: see *Tynedale Steam Shipping Co.* v. *Anglo-Soviet Shipping Co.*,[11] and *Minister of Materials* v. *Wold Steamship Co. Ltd.*[12] In its present form it can, I think, only be read as a continuing warranty of seaworthiness. Whether it is also subject to the exceptions in clause 9 it is unnecessary to determine, since in the circumstances of the case they do not apply. (3) I think that the effect of clause 43 is to make the express provision in clause 1, that the vessel should proceed to the first port of loading with all convenient despatch, applicable to each charterparty voyage. I do not think damages for breaches of this obligation are confined to the voyage in which each breach occurs. It seems to me that the effect of clause 43 is that the delays can be aggregated and damages claimed for any loss of use of the ship. In other words, the charterers are entitled to the use of the vessel for as many consecutive voyages for which the vessel can tender, the owners performing their obligations in regard to convenient despatch subject to the express exceptions. (4) Subject to the express exceptions, I think that it is an implied term of the charterparty that the owners and their servants will exercise reasonable skill and care. Again, I think that, by reason of clause 43, damages for any breach do not fall to be assessed solely in relation to the voyage in which the breach occurs.

For these reasons, I would allow this appeal and uphold the findings of the umpire in regard to each of the first 10 breaches set out in paragraph 56 of the award.

SELLERS L.J. The main issue in the case, as it has been dealt with before both the courts, is the extent of the protection given by the contract to the shipowners in respect of their prima facie responsibility, express or implied, found in the charterparty, for the seaworthiness of the vessel.

Clause 9 of the charterparty provided certain exceptions, but it was not submitted before us that they exempted the shipowners from the present claims of the charterers. The protection which the shipowners seek is the protection which they would have if the provisions of the Hague Rules as applied to a contract of carriage of goods on a bill of lading governed the respective obligations and duties under the charterparty.

A typed clause at the foot of the charterparty provided that "clauses 24–52, as attached, are deemed incorporated in this

[11] (1936) 52 T.L.R. 304.

[12] [1952] 1 Lloyd's Rep. 485.

"charterparty." The last of the attached documents was one headed "paramount clause," and it was in the terms which have already been read. The clause as it stands was expressly incorporated into the contract, but the problem is: What does it mean, what is its effect? The umpire expressed the view in his award that the clause did not entitle the shipowners to rely on the provisions of the Carriage of Goods by Sea Act of the United States in relation to the charterparty or their obligations thereunder. Devlin J., in his judgment, has found a way to read the United States Act into the terms of the charterparty, and has then construed some of its provisions in the setting of the charterparty and held that, notwithstanding that the Act expressly applies to contracts for carriage by sea to and from ports of the United States in foreign trade, that has to be disregarded, and he held that the protection afforded by the Act applied to all the cargo-carrying voyages within the limits of the contractual ports which are practically world wide. On the other hand, the judge was constrained to hold that the provisions of the Act do not apply to a non-cargo-carrying voyage. On this view the vessel would run, as it were, sometimes under the Hague Rules and sometimes not. This would depend on whether or not there was any cargo in the holds. Even a voyage with a special cargo of water to Curaçao (for cargo it would be) would be under the rules, although the same voyage in ballast would not. Further. on the basis of the incorporation of the Act, I can see no adequate justification for striking out the provisions as to United States ports as insensible, although it would seem eminently reasonable so to do. Therefore, the incidence of the Hague Rules would again depend on whether the voyage was to or from an American port. This, as I see it, would be chaotic and not contractual.

The charterparty was entered into in London. The vessel was described as a United States tank vessel and she was at the time of the charter in Chester, Pennsylvania. It is difficult to understand why the American paramount clause was introduced into the attached documents if all that was desired was that the Hague Rules should be made applicable to the charterparty. There is no qualification of the clause, no modification of the Act, and, in addition to the express terms of the clause itself applying it to bills of lading, the Act, when read, clearly states that it does not apply to a charterparty.

It was contended for the charterers, and it might be, that the clause being a bill of lading clause was inserted to apply to bills of lading issued in the course of the charterparty voyages.

There is nothing to say so and a good deal would have to be implied. On the other hand, to give the clause effect as the shipowners submit requires even more imagination and a drastic elimination or substitution of all words which offend against the applicability of the clause to a charterparty. It seems to me that this would be doing what the parties did not do themselves, and would be giving to provisions a certainty and a clarity which they do not possess. Where the court can be certain of the contractual intention, then matters which conflict with the intention may be disregarded as insensible, but if very little seems to fit in with the accepted provisions of a contract and a position of uncertainty and doubt arises—as I think it does here—it would be passing out of the realm of construction if one proceeded to cull or create contractual terms out of the muddled material.

My Lords in both their judgments have revealed the difficulties and contradictions which arise in attempting to fit the United States Carriage of Goods by Sea Act into the charterparty by way of the paramount clause. I agree with the reasoning and conclusions of those judgments, and I do not wish to add to their detailed analyses of the clause and its effect. It may well be that the construction of the Hague Rules (or the provisions of the United States Carriage of Goods by Sea Act) simpliciter would be different from the construction of any given provision in the setting of a charterparty when it would fall to be construed in its association with all other relevant terms. As I would hold that there was no incorporation, the other questions decided by the judge do not arise for further consideration.

The form of the charterparty is a voyage charterparty, but clause 43 of its terms provides that it is to remain in force for as many consecutive voyages for which the vessel can tender for loading within a period of about 18 months, counting from the date of the vessel's readiness to load on the first voyage, the last cargo to be loaded on or about December 31, 1951. The charterers claim that they have lost voyages which they could have fulfilled but for the breaches of contract of the shipowners. If liability of the shipowners is established, the basis of the charterers' claim would, in the light of the contract, be correct. Their loss during the period of time during which they should have had the use of the ship for consecutive voyages falls to be assessed. I would reject the shipowners' argument to the contrary.

As a succession of voyages was contemplated and contracted for, it would, in my opinion, involve that at the commencement of each voyage the vessel was seaworthy as stipulated by clause 1 and as required under the common law obligation to provide a seaworthy ship, including competent officers and crew; and that on each occasion the vessel would with all convenient despatch sail and proceed to the nominated port and complete the voyage with reasonable despatch. In so far as the warranty of seaworthiness is express in the charterparty, it has been made continuing by the words "to be maintained in such condition "during the voyage," the only exception being "perils of the "sea." A vessel is maintained in a watertight condition by the necessary inspections and surveys, replacements and repairs. It does not seem to me to be maintained in a watertight condition if it is allowed to leak and is then repaired with despatch and diligence, as was argued for the shipowners. As the greatest care of maintenance and large expenditure thereon cannot in all circumstances ensure seaworthiness, an exception such as is provided in the charterparty, "perils of the sea excepted," seems appropriate.

Although it was argued on behalf of the shipowners to the contrary (if I have correctly followed the argument), I would add finally that the shipowners are liable, unless expressly exempted, for failure to carry out the contract by reason of lack of reasonable care and skill of the master and crew. In this case, although apparently due diligence and care were taken by the shipowners, a competent engine-room staff was never established, even though the members were changed, and the incompetence or negligence of one or more of the engineer officers was largely responsible for the breakdowns of the engines and the consequent delays.

I agree that the appeal should be allowed and that the provisional findings of the umpire should be upheld. I would answer the ten questions in the affirmative.

Charterers' appeal allowed.
Owners' cross-appeal dismissed.
Leave to appeal to the House of Lords granted.

Solicitors: *Walton & Co.; Constant & Constant.*

M. M. H.

BOYD *v.* WILTON.

C. A.

1957
Mar. 4, 5.

Jenkins, Morris and Sellers L.JJ.

Agriculture—Agricultural holding—Repairs—Compensation—Notice of intention to claim by landlord—Form—Notice setting out alternative claims based on tenancy agreement and statute—Whether valid notice—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 57, 70.

Within two months of the termination of an agricultural tenancy the landlord served a notice on the tenant under section 70 of the Agricultural Holdings Act, 1948, of his intention to make certain claims under the Act. The notice set out that the claims were made under the conditions of letting dated February 25, 1939, section 57 of the Act of 1948, and the custom of the country. The tenant alleged that the notice was invalid and contrary to section 57 (3) (*b*), in that it included claims both under a contract of tenancy and under section 57 (1) of the Act. At the arbitration the landlord abandoned all claims except those arising under the agreement. The arbitrator stated a case for the opinion of the county court judge, who held that the notice was a valid one:—

Held, that section 57 dealt with right to compensation and there was nothing in subsection (3) to prohibit claims being made in the alternative, although it did mean that no one was to have an effective or enforceable claim to compensation in respect of any given holding both under a contract of tenancy and under subsection (1). Section 70, which provided for the service of the notice and the matters to be set out therein, did not suggest that it was vital not to make claims under two or more headings. The notice in question was not one making cumulative claims but could fairly be construed as one making alternative claims; and it was a valid notice.

APPEAL from Judge Shepherd sitting at Liskeard County Court.

Henry Ley Wilton, the former tenant of an agricultural holding, appealed against the decision of the county court judge on a special case stated by an arbitrator under the Agricultural Holdings Act, 1948,[1] regarding the validity of a notice served

---

[1] Agricultural Holdings Act, 1948, s. 57: "(1) The landlord of an "agricultural holding shall be en-"titled to recover from a tenant of "the holding, on the tenant's quitting "the holding on the termination of "the tenancy, compensation in "respect of the dilapidation or "deterioration of, or damage to, any "part of the holding or anything in "or on the holding caused by non-"fulfilment by the tenant of his "responsibilities to farm in accord-"ance with the rules of good hus-"bandry. (2) The amount of the "compensation payable under the "foregoing subsection shall be the "cost, as at the date of the tenant's "quitting the holding, of making "good the dilapidation, deterioration "or damage. (3) Notwithstanding "anything in this Act, the landlord "may, in lieu of claiming compensa-"tion under subsection (1) of this

C. A.

1957

Boyd
v.
Wilton.

by the landlord, Colin Lindsay Boyd, on the tenant, of his intention to make certain claims under the Act.

The following relevant facts are taken from the case stated. The freehold interest in the agricultural holding in question, known as Lower Langdon Farm, St. Neot, Cornwall, was owned by the landlord. In 1938 the tenant entered and took over the holding. In 1939 both landlord and tenant signed a document drawn up by the parties' valuers and agents entitled " Conditions " of letting " dated February 25, 1939. The tenancy was duly determined by a notice to quit given by the tenant which expired on September 29, 1955. On November 28, 1955, pursuant to section 70 of the Act, the landlord's land agent gave the following notice to the tenant's land agent of the landlord's intention to make claims arising out of the termination of the tenancy. The document was headed " Agricultural Holdings Act, 1948. Re " the holding known as Lower Langdon, St. Neot, Liskeard, " Cornwall," addressed to the tenant care of his valuer or agent, and read:—" I hereby give you notice pursuant to section

---

" section, claim compensation in " respect of matters specified therein " under and in accordance with a " written contract of tenancy, so " however that—(*a*) compensation " shall be so claimed only on the " tenant's quitting the holding on " the termination of the tenancy; " and (*b*) compensation shall not be " claimed in respect of any one " holding both under such a contract " and under the said subsection (1); " and for the purposes of paragraph " (*b*) of this subsection any claim " under subsection (1) of section " seven of this Act shall be disregarded."

S. 70: " (1) Without prejudice to " any other provision of this Act, any " claim of whatever nature by the " tenant or landlord of an agricultural holding against his landlord " or tenant, being a claim which " arises—(*a*) under this Act or any " custom or agreement; and (*b*) on " or out of the termination of the " tenancy of the holding or part " thereof, shall, subject to the provisions of this section, be determined by arbitration under this " Act. (2) No such claim as aforesaid shall be enforceable unless " before the expiration of two months " from the termination of the tenancy " the claimant has served notice in " writing on his landlord or tenant, " as the case may be, of his intention " to make the claim. A notice under " this subsection shall specify the " nature of the claim, and it shall be " a sufficient specification thereof if " the notice refers to the statutory " provision, custom or term of an " agreement under which the claim " is made . . . (4) Where, by the " expiration of the said period and " any extension thereof made under " the last foregoing subsection, any " such claim as aforesaid has not " been settled, it shall cease to be " enforceable unless, before the " expiration of one month from the " end of the said period and any " such extension, or within such " longer time as the Minister may " in special circumstances allow, an " arbitrator has been appointed by " agreement between the landlord " and the tenant under the subsequent provisions of this Act in that " behalf or an application for the " appointment of an arbitrator under " those provisions has been made by " the landlord or the tenant."

C. A.
1957

BOYD
v.
WILTON.

"70 of the above Act of my intention to make against you "certain claims arising out of the termination of the tenancy of "the above holding or part thereof, the nature of which claims is "set out in the Schedule hereto." The Schedule was set out as follows:—

Nature of Claim	Statutory provision, custom or term of agreement under which the claim is made.
Repairs to live and dead hedges, walls, gates, posts, orchards, drains, gutters, watercourses, drawing earth, foul condition, breaking up permanent pasture, selling off produce, non-manuring, shortage of roots, shortage of seeds, thatching of ricks, bad siting of ricks, shortage of hay and straw in buildings, repairs to roads and yards. £2.000	Conditions of letting dated 25th February, 1939, clauses 3, 4, 5, 6, 7, 8, the Agricultural Holdings Act, 1948, s. 57 and the custom of the country.
Repairs to farm house, farm buildings, repairs and renewals of landlord's fittings and fixtures, repairs and renewals to water supply to farmhouse hot water supply, sewers and sanitation. £700	Conditions of letting dated 25th February, 1939, clause 3 and the Agricultural Holdings Act, 1948, and S.I. 184.
£2,700	

The respective land agents acting for the landlord and the tenant having been unable to agree the amounts payable to the landlord and to the tenant as a result of the termination of the tenancy, appointed an arbitrator.

In the statement of the tenant's case for the purposes of the arbitration the following objection was made: "As to such "notice as a whole [the notice from the landlord set out above], "the same is bad in that the landlord has claimed under both "the alleged contract and under the Act and under the custom "of the country contrary to section 57 (3) (*b*)." At a hearing of the arbitration proceedings on March 8, 1956, the landlord's solicitors abandoned any claim against the tenant under section 57 (1) of the Act.

It was contended, inter alia, on behalf of the landlord that the landlord's notice dated November 28, 1955, was a valid notice under section 70 of the Act of his intention to make claims against the tenant under the Conditions of letting.

It was contended, inter alia, on behalf of the tenant that the notice given by the landlord and dated November 28, 1955, was not a valid notice in that the landlord had purported to make claims under the Conditions of letting, under section 57 of the Act, and under the custom of the country, contrary to section 57 (3) (*b*) of the Act. It was also contended on behalf of the tenant that the Conditions of letting dated February 25, 1939, were not binding on him for reasons not relevant to the present report.

Those contentions having been raised the arbitrator referred the matter for the opinion of the court. The county court judge stated his opinion on the question of law as follows:— "1. The Conditions of letting dated February 25, 1939, . . . "constituted a valid and enforceable agreement for a lease of "Lower Langdon Farm, St. Neot, Cornwall, as from the date "thereof having been made for valuable consideration, and con-"stituted 'a contract of tenancy' within the meaning of "section 94 (1) of the Agricultural Holdings Act, 1948. 2. The "landlord's notice to the tenant dated November 28, 1955, . . . "of his intention to make claims against the tenant under "three headings, namely, the said Conditions of letting dated "February 25, 1939, section 57 of the said Act and the custom "of the country, is not an invalid notice by virtue of section "57 (3) (*b*) and section 70 (2) of the said Act for the following "reasons:—(*a*) The landlord at the hearing before the arbitrator "which took place on March 8, 1956, being after the expiration "of two months from the termination of the tenancy, abandoned "all claims against the tenant other than those based upon the "written contract of tenancy, and, (*b*) The word 'claim' as "used in section 57 (3) of the said Act bears the same meaning "and is synonymous with the word 'recover' as used in section "57 (1) of the said Act."

The tenant appealed only on the question of the validity of the notice of November 28, 1955, on the grounds that the judge was wrong in law in holding (1) that the word " claim " in section 57 (3) of the Agricultural Holdings Act, 1948, bore the same meaning as the word " recover " in section 57 (1) of the Act; and (2) that the abandonment by the landlord at the hearing before the arbitrator (which took place after the expiration of two months from the termination of the tenancy) of all claims other than those based upon agreement was a timely election by the landlord having regard to the provision of sections 57 (3) and 70 (2) of the Act.

D. M. Scott for the tenant. The case raises a short but important point of construction of section 57 of the Agricultural Holdings Act, 1948, namely, whether it is open to a landlord, in a notice of intention to claim compensation, to do so under more than one head. There is no authority on this exact point. [Reference was made to Jackson's Agricultural Holdings and Tenant Right Valuation, 10th ed., p. 177.] The vital subsections are (1) and (3) of section 57, particularly (3) (*b*). It is in relation to subsection (3) (*b*) that the judge below held that " claim " bears the same meaning as " recover " in subsection (1). If that were the intention, there would have been no difficulty in inserting " recoverable " in subsection (3) (*b*). Words are deemed to be used in their ordinary and popular sense, and the popular meaning of " recover " and " claim " is sharply differentiated. There are passages in the Act which show that the draftsmen had the distinction well in mind: see sections 56 and 58. It is impossible to hold that in the intervening section the words bear the same meaning.

The landlord must elect whether he is going to proceed under the Act or the agreement.

[Morris L.J. Can a farmer say that he will claim under both heads and then elect at the arbitration, being aware that he can only recover under one?]

If the judge below is right, he can do that, but not if, as is submitted, the judge is wrong. To be recoverable a claim must be made. The reason why the word " claimed " was inserted in section 57 (3) (*b*) becomes clear when one looks at section 70 (2). The object of the notice is to ensure that the party against whom the claim is being made receives early warning, so that he can prepare to meet it before the evidence is obliterated. A further reason for requiring a notice is that the party may then limit his evidence to the things claimed.

[Morris L.J. If someone claimed in breach of section 57 (3) (*b*), he is not committing any offence?]

No, it is merely an ineffective notice under section 70 (2).

Reading section 57 (3) (*b*) and section 70 (2) together, the intention is clearly that there must be an election by the landlord and that it must be made in the notice of intention to claim. A notice of an intention to claim means notice of a claim which may lawfully be made, and by section 70 (2) that notice must be given within two months. In a case of a claim by a tenant against a landlord, the tenant is not obliged to elect under which head he will proceed, and since section 70 (2) deals with claims by both landlords and tenants it is not surprising that there is nothing express in the section with regard to a landlord's notice. A notice which gives notice of intention to make a claim which the statute expressly forbids is not a notice which satisfies section 70 (2), and therefore claims so notified are unenforceable. The date of the landlord's claim in the present case was the date of the notice (November 28, 1955), or, at the latest, the date of the valuation. The landlord's abandonment of part of his claim in March, 1956, could not have the effect of curing the notice given in November, 1955. The effect of section 57 (3) (*b*), to put it at its lowest, is that the tenant cannot be called on to meet claims both under the Act and under his tenancy agreement, and the object of the notice under section 70 (2) is to acquaint the parties as to claims to which their evidence must be directed. A notice showing an intention to make claims some of which must be abandoned sooner or later defeats the whole object of section 70 (2).

None of the authorities is in any way on all fours with the present case, but some of the observations may be of some assistance: see *Gulliver* v. *Catt*,[2] *Kent* v. *Conniff*[3] and *Barrow Green Estate Co.* v. *Executors of Walker, decd.*[4]

On the proper construction of sections 57 and 70, "claimed" means what it says, and a landlord must elect between claiming under the Act and under the tenancy agreement at the time when he serves his notice of intention to claim.

Anthony Cripps for the landlord. The tenant's argument depends on "claim" having a different meaning from "recover."

---

[2] [1952] 2 Q.B. 308; [1952] 1 T.L.R. 956; [1952] 1 All E.R. 929.

[3] [1953] 1 Q.B. 361; [1953] 1 All E.R. 155.

[4] [1954] 1 W.L.R. 231; [1954] 1 All E.R. 204.

C. A.
1957

Boyd
v.
Wilton.

It is submitted (1) that in the present context they mean the same; (2) but that if that is wrong, there is in fact no violation of the prohibition contained in section 57 for four reasons: (a) the prohibition relates to a claim and not to a notice of intention to make a claim; (b) the prohibition relates to contravention of the subsection, not of the whole section; (c) the notice of intention, in the present case, ought to be construed in the alternative; (d) because there was a timely election. If those two propositions are wrong, then it is submitted (3) that in any event no express sanction is imposed on anyone by the Act and the absence of such a sanction should not be the basis for imposing one.

With regard to the first proposition, a claim does not mean a hopeful claim, but one which is expected to be satisfied. "Claim" can be used in two ways: either in the sense that the recovery occurs almost automatically or in the sense of vexatious claims. The Agricultural Holdings Act, 1948, is a consolidating Act which contains parts of 14 different Acts extending over a hundred years, and therefore the construction should not be so strict. For example, in section 4, "claims to" must mean the right to recover. In section 64 it is provided that the landlord or tenant "shall not be entitled . . . ," and yet the sidenote to the section says "claims." Although the sidenote cannot be used for the purposes of construction, it is obvious that the draftsmen made no distinction between the two words. Then again in section 97, compensation to be received in certain circumstances is described as such "as could have been claimed." Those references show that "claim" can mean "recover."

As to the second proposition, section 57 (3) refers to a claim under subsection (1). On the notice of intention to claim, there is no mention of subsection (1) but only of section 57. A claim under section 57 does not necessarily mean a claim under subsection (3), any more than it means a claim under subsection (1). A reference to section 57 might refer to the customary rights which are preserved by the section. What is prohibited by section 57 (3) (*b*), if anything, is not the notice of intention but the actual making of the claim. The object of the notice is to let the other side know the outside limit of the claim. The claim is made when it comes before the arbitrator. If "claim" is used in the sense suggested by the tenant, the landlord would be put to the disadvantage of having to elect when he serves his notice. In the Shorter Oxford Dictionary one of the two popular meanings of "to claim" is "to be entitled to." "Claim" is capable of a number of shades of meaning; when used in connexion with the notice of intention to claim, it need not be read in the same way as "claim" alone. "Claim" in section 57 is the same as "entitled to" and therefore the same as "recover." The landlord's notice of intention to claim incorporates the provisions of section 57 by reference, and by reading the notice it can be seen that the claims are mutually exclusive.

In any event, there is no violation of the prohibition in section 57 because, first, the section only deals with a claim and not a notice of intention to claim; secondly, the prohibition only extends to claims made under subsection (1), whereas in the present case the claim is made under the whole of section 57; thirdly, the notice of intention to claim in the circumstances of the present case should be interpreted in the alternative. There was a timely election, since the time limit in section 70 (2) only applies to the notice of intention to claim, to be distinguished from the actual making of the claim. Section 70 (2) renders claims unenforceable where the notice has not been given within two months; accordingly, section 57, which is the section dealing with the making of claims, only operates on the claim itself, and section 70 (2) cannot have any effect on the claim by reason of the correctness or incorrectness of the notice. It is unnecessary to bring in any machinery under section 57, because if section 57 (3) were extended to render a notice of intention to claim unenforceable, one would expect to find it expressly stated, particularly as section 70 (2) deals with it so fully. The commencement of the claim was the commencement of the calling for compensation, which would be when the arbitrator accepted his office.

[SELLERS L.J. Then, even if you made alternative claims, you might not elect until the award was actually made.]

Even if the preceding propositions are wrong, nevertheless the landlord should succeed, because the Act does not impose any sanction for a violation of the section and it would be wrong to invent one. Section 101 shows that no rights or remedies should be cut away and no penalties imposed unless the Act expressly says so. If the tenant's argument is right, then a notice of intention to claim made under the agreement and section 57 (1) would be bad, but if it claimed under custom and either the agreement or section 57 (1), it would be good, because the prohibition, if there is one, against alternative claims does not apply to a claim under custom. The effect of imposing a sanction here would be that the whole notice would be bad.

Scott in reply. The landlord's argument is based on the assumption that "claim" here means the same as "recover." There is a very strong presumption that the words are used in different senses. By virtue of section 70 (2) it is open to a party to follow up his notice of intention by making the claim, but it is not obligatory. The time when a claim is made must be common to all cases, and the claim therefore cannot be made at the arbitration, because not all cases go to arbitration. The reference to section 57 in the landlord's notice must be to section 57 (1), for that is the only part of the section under which a claim may be made. A claim under a contract of tenancy, though made in accordance with section 57 (3), is not made under that subsection. This distinction is recognized in section 7 (1) of the Act. The claim here was made, at the latest, when the respective valuers met, but it is submitted that it was made even earlier, namely, when the procedure laid down by section 70 was set in motion by the service of the notice of intention to claim. By its terms the notice of intention to claim is incapable of being construed in the alternative. The notice is bad and therefore to be regarded as never having been given.

[SELLERS L.J. It may be that there are two agreements and the landlord does not know which agreement is operative. He may be 95 per cent. certain in respect of one agreement but the arbitrator may find in favour of the other, and if the tenant's argument here is right, then the landlord would lose everything. It is forcing him to elect at a time when not all the facts are known.]

If there is a controversy between the parties as to which agreement is effective, it can be referred to the court in the normal way.

JENKINS L.J. stated the facts, read sections 57 and 70 of the Agricultural Holdings Act, 1948, and continued: Mr. Scott, for the tenant, claims that the answer given by the judge to the question regarding the validity of the notice is wrong in both its branches. He argues the matter, in effect, thus: he says, if one reads section 57 of the Act perfectly literally and giving every word contained in it its ordinary meaning, one finds that there is categorically a prohibition against any claim by a landlord both under subsection (1) of the section and under a contract of tenancy: "compensation shall not be claimed in respect of any "one holding both under such a contract and under the said "subsection (1)." He says that it follows that any notice of

C. A.
1957

BOYD
v.
WILTON.

Jenkins L.J.

intention to make a claim served under section 70 which claims not only under a contract of tenancy, but also under subsection (1) of section 57, is an invalid notice. He says that while such invalidity might no doubt be cured by substituting within the two months' period a fresh notice claiming only on one of the two grounds, that possibility necessarily disappears once the period of two months from the termination of the tenancy, being the period allowed by section 70 for the giving of notice of intention to claim, has expired; once that period has run, no notice which is otherwise invalid can be given validity by any amendment or disclaimer; the two months' period allowed for giving notice of intention to make a claim has run out and during the time allowed no valid notice has been given, because the notice cannot be a valid notice if it expresses an intention to claim that which the Act says may not be claimed. That argument has, I think, a good deal to be said for it as capable of being extracted from the language of the Act without doing violence to that language; but, in my view, it cannot prevail. We have heard full and interesting arguments on both sides, but in the end the matter comes down, I think, to a short question of construction.

The judge, as appears from the part of his order which I have read, founded himself on the view that the word "claim" as used in section 57 (3) of the Act bears the same meaning as the word "recover" as used in section 57 (1) of the Act. That view was attacked by Mr. Scott as having no warrant for it in the language of the Act. What justification can there be, says Mr. Scott, for substituting "recovery" for "claim"?—when the Act says "claim" it means "claim," and when it refers to "recovery" it means "recovery." I am disposed to agree that, at first sight, the judge's method of solving the matter appears to have been a somewhat radical one, owing to the substitution of words which it involved; but, in my view, it is reasonably plain, if one looks at section 57 of the Act as a whole, that that section is dealing with rights. It is dealing with rights to compensation, and it is not dealing with methods of enforcing rights or questions of procedure. Thus, I think section 57 (3) can be fairly construed as meaning that no one is to have an effective or enforceable claim to compensation in respect of any given holding both under a contract of tenancy and under subsection (1). They can get one or the other, but not both of these things. I would add that there is nothing in section 57 to say that if a claim is put forward on both grounds in respect of any one holding, then the landlord putting forward the claim shall be disqualified from receiving compensation on either ground. Moreover, as I have said, I think this section is dealing with rights; and, that being so, I do not think it is really directed to the putting forward of claims. It is directed rather to the existence of enforceable claims. Even if one construes subsection (3) in the most literal manner possible, it imports no more than a prohibition against making a claim both under the contract and under the said subsection. In my view, that language is not apt to prohibit the making of claims in the alternative. I think it might well be held not to prohibit the making of two distinct claims, one under the Act and one under a tenancy agreement. It is no doubt clear that at some stage there must be an election. If a landlord puts his case in the alternative, he must at some stage elect which alternative he is going to adopt. If he puts forward an excessive claim, in that it claims twice over, once under the contract and once under the subsection, it is clear that he must abandon one or other of those claims before he can recover anything; but I see nothing in section 57 (3) to disqualify such a person from recovering at all. No doubt, in order that his notice under section 70 should be a valid notice, he must be able to point to some claim which is a claim permitted by the Act. If, for example, a landlord intermixed in respect of different items comprised in the same holding claims under the Act and claims under a written tenancy agreement, it may be that he would produce the result that a good claim—that is to say, a claim only under the Act or only under the tenancy agreement—could not be spelt out of the notice so framed; but there is, so far as I can see, no question of that in the present case.

I think the view I have formed as regards section 57 (3) is borne out by the language of section 70. If a landlord giving a notice under section 70 was to risk the loss of the whole of his right to compensation if he referred in his notice to the statutory right to compensation, and also to the contractual right to compensation, it seems to me that section 70 would inevitably have been drafted with very much more precision. It is framed in quite loose and general terms, so far as the form of notice is concerned. Under subsection (2) the claimant—it is the landlord in this case—has to serve a notice in writing on his tenant of his intention to make the claim, and it says: "A notice under this "subsection shall specify the nature of the claim, and it shall be "a sufficient specification thereof if the notice refers to the "statutory provision, custom or term of an agreement under "which the claim is made." There is nothing there to suggest that it is vital not to make claims both under the statute and under the contract.

I return to the notice, the validity of which has been impeached in these proceedings. I have read it several times over and I have heard the submissions of counsel upon it; and, whatever view one takes of section 57 (3), it seems to me to be reasonably plain that this notice was not a notice making cumulative claims under the tenancy agreement and under the Act. It will be remembered that the first entry in the second column refers to Conditions of letting dated February 25, 1939, clauses 3, 4, 5, 6, 7, 8, the Agricultural Holdings Act, 1948, section 57 and the custom of the country. It will be seen that the reference there is to section 57 as a whole, not to section 57 (3). Therefore, this entry must be regarded as importing into the notice the provisions of section 57. When one turns to the provisions of section 57, one finds that under that section a claim may be made under subsection (1) and a claim may be made under subsection (3), but these two claims are mutually exclusive and can only be pursued as alternatives. That is apparent on the face of the section when it is imported into the notice. So one has what seems to me can fairly be construed as an alternative claim; and, as I have said, in my view, there is nothing in subsection (3) of section 57 to prohibit claims being made in the alternative. As to the second entry in the notice, the second group of matters, I gather no objection was raised to the way that part of the notice was formulated, save that it is said that the reference in the other part of the notice to section 57 had the effect of destroying the whole of the notice.

As to the first ground on which the judge founded himself—that is to say, the abandonment of all claims against the tenant other than those based upon the written contract of tenancy—it seems to me, although Mr. Scott argued to the contrary, that where (as in the present case) an alternative claim is made, it must be open to the landlord at the arbitration to state that he abandons one of the alternatives and relies exclusively on the other. So, by the time the arbitration was concluded, it was plain that nothing was being claimed by the landlord other than his rights under the tenancy agreement; and that, indeed, appeared from the statement of the landlord's case which was produced for the purposes of the arbitration.

I trust that I have dealt with this matter adequately. I am sensible that I have not dealt in terms with all the arguments and have not cited the authorities to which we were referred, in the course of which observations have been made on the construction of section 57. I do not think any of those authorities, which were directed really to other points, can carry the matter much further. I can only say that, in my judgment, the judge was right in the conclusion to which he came, though I do not say I am prepared to go all the way with him in his theory that "claim" and "recover" in this section mean precisely the same thing.

For these reasons, in my view, this appeal should be dismissed.

Morris L.J. The point of law that was stated by the arbitrator in this case related to the validity of the notice that had been served. The contention of the tenant, as expressed in the case stated by the arbitrator, is as follows: "That the "notice given by the landlord and dated November 28, 1955, ". . . is not a valid notice in that the landlord has purported "to make claims under the Conditions of letting . . . under "section 57 of the Act, and under the custom of the country, "contrary to section 57 (3) (*b*) of the Act." It is said therefore by the tenant that the notice that was served in this case was a bad notice because of the provisions of section 57 (3). Section 70 (2) provides that a claim as referred to in subsection (1) shall not be enforceable unless before the expiration of two months from the termination of the tenancy the claimant has served notice in writing on his landlord or tenant, as the case may be, of his intention to make the claim. Then it is provided that the notice must specify the nature of the claim and that it shall be a sufficient specification if the notice refers to the statutory provision, custom or term of an agreement under which the claim is made. So the tenant says the claim of the landlord ought not to be proceeded with and cannot succeed because no proper notice of the claim was ever given, for the reason that the notice which was delivered dated November 28, 1955, was an invalid notice. In that notice, under the heading "Statutory provision, custom or term of "agreement under which the claim is made," there is first a reference to the Conditions of letting, then to section 57, and then to the custom of the country. It is, I think, important to note that the whole of section 57 is referred to. Section 57 (3) provides that the landlord may, in lieu of claiming compensation under subsection (1), claim compensation in respect of matters specified therein under and in accordance with a written contract of tenancy: then it is provided that compensation shall not be claimed in respect of any one holding both under such a contract and under subsection (1). In the notice which was delivered there is no specific mention of subsection (1). The first mention is of the Conditions of letting and then follows a general reference to section 57. One possible view might be that the reference to section 57, following upon a reference to the contract, was an indication that the claim would be under the contract. As against that view, it might be said that there was no point in mentioning section 57 unless it was had in mind that the provisions of section 57 (1) gave an alternative right to the landlord. But it seems to me that there was no reason why the landlord should not serve a notice under section 70 (2) of his intention to make alternative claims and serve a notice which kept alive his alternative rights under section 57. I think it is a little difficult to suggest that the landlord, by a general reference to section 57, which, as anyone who reads it would see, contains provision as to alternative claims, is giving notice that he is proposing to claim in defiance of the terms of the section to which he refers. I think, therefore, that the notice dated November 28 was a notice which complied with section 70 (2); it was a notice referring to section 57 and was a notice which raised alternative claims. When the arbitration came on, the landlord then abandoned any claim under subsection (1) of section 57.

I am not sure that I would quite express the matter in the way in which the judge expressed it. He was willing to interpret the word "claim" in section 57 as being synonymous with the word "recover." But the conclusion that I have reached is to the same effect as that of the judge. I think there is force in what Mr. Scott has said, that if in one section one finds first the word "recover" and later the word "claim," one would expect those two words to have some different significance. Section 57 (1) speaks of the landlord being "entitled to recover" from the tenant, and subsection (3) speaks of a claim, and provides that the landlord, in lieu of claiming compensation under subsection (1), may "claim compensation in respect of matters specified "therein under and in accordance with a written contract of "tenancy." I read the word "claim" in subsection (3) as meaning claim to be entitled to recover. But I cannot see that in the present case the landlord has ever said or done anything which indicates a defiance of subsection (3). He has never claimed to be entitled to recover compensation both under subsection (1) and under the written contract of tenancy. He has never asserted any such right. In the result, therefore, I come to the same conclusion as that reached by the judge. I agree entirely with my Lord that section 57 is a section that deals primarily with rights.

SELLERS L.J. I agree that this appeal should be dismissed for the reasons given by my Lord and Morris L.J., and there is little that I wish to add. The tenant's contention is that the landlord was out of court in his claim in this case because he had not complied with the requirements of section 70, which is the section which deals with the method of settling claims between the landlord and tenant on termination of a tenancy. The reason why it is said that his claim must fail is that within the specified period of two months the landlord had not served the notice which is required by subsection (2) of that section. It is, as I think it has been indicated to the court, the only notice which is required to be served in order to bring into operation the provisions of that section for determination of a dispute of this character. Why it is said that it is an insufficient or a bad notice is, as I understand it, that it has made alternative claims and not specified the precise claim which the landlord wished to make. If that is to be designated as bad, an invalid notice, it must, as it seems to me, be based, certainly primarily (and, as I think, finally) on the interpretation of section 70 (2), which says: " No such claim as aforesaid "—that is, a claim arising in circumstances of termination of a tenancy—" shall be enforce-" able unless before the expiration of two months from the " termination of the tenancy the claimant has served notice in " writing on his landlord or tenant, as the case may be, of his " intention to make the claim." It is then, at that stage, only a notice of intention. Notwithstanding the argument of counsel for the tenant, I would hold that the notice which was given was clearly a notice under section 70 and in its express terms was no more than a notice of an intention to make certain claims. The next part of section 70 (2) seems to me very vital for consideration of this matter. It is in these terms: " A notice under this " subsection shall specify the nature of the claim, and it shall " be a sufficient specification thereof if the notice refers to the " statutory provision, custom or term of an agreement under " which the claim is made." If it is to be said that that prohibits alternative claims, then I should regard that provision of the

C. A.
1957

BOYD
v.
WILTON.

Sellers L.J.

subsection as being misleading, because there is nothing to indicate there that the claims must not be in the alternative. Indeed, it would seem to me that the notice of intention to make a claim is to be, or may well be, of an informal character, specifying the nature of the claim, and it will be sufficient if the claim refers to the matters specified. I would not myself interpret section 70 (2) as prohibiting in any way alternative claims by way of notice of intention of making a claim. In practice it would seem that it might be most desirable that that could be done. There might be a contract of tenancy alleged by the landlord or alleged by the tenant—it might be a favourable one for the tenant—which either of them was seeking to set up, but because of the contentions of the other side, which at that stage might not be very clearly known, it was desired to have an alternative should that fail. The next step is provided by subsection (3), where the landlord and the tenant or their representatives may get together and discuss the matter and possibly arrive at a settlement. I can see no reason there why the alternative claims should not be discussed; and, although I am not very familiar with the practice in this branch of the law, I apprehend it must have occurred many times that the contract would be referred to and there might be a dispute about that; then, the claim failing under the contract or on a disagreement on the contract, the parties would fall back on section 57 (1). Be that as it may, the alternative claim would seem to be well within the province of section 70 (2).

I do not propose to add anything more to what my Lords have said about section 57 itself. It does in its terms deal with compensation, as I think, and is not dealing, as section 70 is, with procedure in relation to the settlement of the claims or, failing settlement, to arbitration.

On those grounds I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Robbins, Olivey & Lake for Stephens & Scown, St. Austell; Blight, Son & Broad, Callington.*

C. J. E.

COMPANIA NAVIERA AZUERO S.A. *v.* BRITISH OIL & CAKE MILLS LTD. AND OTHERS.

1957
April 4, 8.

Pearson J.

Shipping — Charterparty — Demurrage — " Weather working days " — Meaning—Rain during period when no work being done or contemplated—" Laydays in loading and discharging to be calculated on " the basis of 24 *hours per day."*

A charterparty for the carriage of grain in bulk provided: " Cargo to be received at destination at an average rate of not less " than 1,000 tons per weather working day (Sundays and holidays " excepted) provided vessel can deliver at such rate . . ." and by a further clause: " laydays in loading and discharging to be " calculated on the basis of 24 hours per day." During the period of unloading there were certain times when rain fell which was heavy enough to stop or prevent unloading operations, if such operations had been started or intended, but in fact the receivers' arrangements were such that no work of unloading was being done during those periods nor was it intended that any work would have been done even if they had been periods of fine weather:—

Held, that a " weather working day " was a day on which the weather permitted the relevant work to be done, whether or not the defendants availed themselves of the opportunity, and, accordingly, laytime did not run during those periods when the weather did not permit the relevant work to be done, irrespective of the actions, intentions or plans of the defendants.

Dictum of Scrutton L.J. in *Burnett S.S. Co. Ltd.* v. *Danube and Black Sea Shipping Agencies* [1933] 2 K.B. 438; 49 T.L.R. 553 applied.

Alvion Steamship Corporation Panama v. *Galban Lobo Trading Co. S.A. of Havana* [1955] 1 Q.B. 430; [1955] 1 All E.R. 457 considered.

ACTION.

By a charterparty dated November 3, 1955, made between the plaintiffs, the owners of the ss. *Azuero*, and Louis Dreyfus & Co. Ltd., as charterers, the vessel was chartered to proceed to Baltimore or Philadelphia or Norfolk (Virginia) as ordered, and there to load a complete cargo of grain in bulk and to proceed to Belfast or Cardiff or Barry or Avonmouth or London. The charterparty provided for discharge at two ports if required. The four defendants were indorsees of some of the bills of lading issued for the voyage which incorporated " all terms, " conditions and exceptions " of the charterparty. The vessel loaded at Philadelphia and discharged at Belfast and Avonmouth,

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

in that sequence, and the defendants each took delivery at Avonmouth. Clause 10 of the charterparty provided: "Cargo to be "received at destination at an average rate of not less than 1,000 "tons per weather working day (Sundays and holidays excepted) "provided vessel can deliver at such rate, time counting at first "or sole port from 7 a.m. on the next business day following "receipt at or before 4 p.m. (or at or before 12 noon if on "Saturday) of the master's notice of readiness to discharge, "whether in berth or not, and at second port, if used, from "receipt of master's notice of readiness to discharge, whether in "berth or not, failing which receivers to pay demurrage at the "rate of £300 (three hundred pounds British sterling) per day "or pro rata for part of a day. For all laytime saved, owners to "pay despatch money at the rate of £150 (one hundred and fifty "pounds British sterling) per day or pro rata for part of a day," and clause 14 provided "laydays in loading and discharging to "be calculated on the basis of 24 hours per day."

At Belfast unloading was carried out at a faster average rate than 1,000 tons per weather working day, but at Avonmouth at a much slower average rate than 1,000 tons per weather working day. No rain or other bad weather occurred during the discharge of the Belfast portion of the cargo, but during the period at Avonmouth there were 62 hours of rain of such intensity as would have been heavy enough to stop or prevent unloading operations if such operations had started or been intended. In fact the defendants' arrangements were such that no work was being carried out at the times of the onset of the rain and none was contemplated, even if those periods had been periods of fine weather.

The plaintiffs brought an action for demurrage against the defendants and claimed that by the terms of the charterparty the laytime to be allowed was to be calculated separately for each port of discharge and dispatch money or demurrage paid separately in respect of each port, and further that deductions were to be made in calculating laytime in respect of periods of rain occurring during the running thereof only to the extent that such periods of rain served to prevent the work of discharging the cargo. Pearson J. decided the first point in favour of the defendants, and that is not included in this report.

Ashton Roskill Q.C. and *Basil Eckersley* for the plaintiffs. Clause 14 of the charterparty clearly provides that a working day consists of 24 hours. For the purpose of computing lay time there must be deducted from that period of 24 hours any period of time during which bad weather interrupts the work of discharging the ship. It is equivalent to "rain stops play." The test is not how long it rains during the period of 24 hours but for what length of time work, or intended work, is interrupted by bad weather. There is no direct authority upon the meaning of "weather working day," but the present submission is supported by the view of Lord Goddard C.J. in *Alvion Steamship Corporation Panama* v. *Galban Lobo Trading Co. S.A. of Havana*,[1] where he said: "It simply means that the working day is to be reduced "by the time in which working is suspended by reason of the "weather. . . ." The reservation made later in that judgment [2] does not qualify the clear above-cited words. The plaintiffs' approach avoids the necessity of introducing stopwatches day and night to record the time that rain is falling. [Reference was also made to *Bennetts & Co.* v. *Brown*,[3] *Dampskibsselskabet Botnia A/S* v. *C. P. Bell & Co.*[4] and *Burnett Steamship Co. Ltd.* v. *Danube and Black Sea Shipping Agencies*.[5]]

Eustace Roskill Q.C. and *R. A. MacCrindle* for the defendants. It is agreed that there is no direct judicial decision on the point. The phrase should be given its ordinary meaning. Lord Goddard C.J. in the Court of Appeal expressly refrained from deciding the point in the *Alvion* case.[6] McNair J. in that case clearly took the view [7] that the question to be considered was not only whether during a working day the weather did interfere, but also whether, if work had been in progress, weather would have interfered with the loading or discharging of the cargo. The use by him of the words "or would" indicate that it matters not that no work is being carried out or is intended to be carried out during the periods of rain. The Court of Appeal did not say that he was wrong on this point. Scrutton L.J. in a dissenting judgment in *Burnett's* case [8] also subscribed to that view, and it appeared in the 14th edition of Scrutton on Charterparties (1939) and is repeated in similar terms in the 16th edition, at page 364, note 5.

Cur. adv. vult.

---

[1] [1955] 1 Q.B. 430, 445, 446; [1955] 1 All E.R. 457.

[2] [1955] 1 Q.B. 430, 449.

[3] [1908] 1 K.B. 490; 24 T.L.R. 199; 13 Com.Cas. 110.

[4] [1932] 2 K.B. 569; 48 T.L.R. 93; 101 L.J.K.B. 574; 41 Ll.L.Rep. 160.

[5] [1933] 2 K.B. 438; 49 T.L.R. 553; 103 L.J.K.B. 44; 46 Ll.L.Rep. 231.

[6] [1955] 1 Q.B. 430, 449.

[7] Ibid. 438.

[8] [1933] 2 K.B. 438.

1957

COMPANIA NAVIERA AZUERO S.A. *v.* BRITISH OIL & CAKE MILLS LTD.

April 8. PEARSON J. delivered a judgment in which he stated the facts, held that there should be only one calculation of lay-days in respect of all the unloading at both ports, and continued: The second question is as to the meaning of the expression "weather working days" in clause 10. Clause 14 provided: "Laydays in loading and discharging to be calculated on the "basis of 24 hours per day." Clause 14 looks as if it may produce some artificial results, but as it is a clause of this contract, it has to be applied whether the results are artificial or not.

The question arises in this way. At Avonmouth, the laytime began at 8.45 a.m. on December 8, 1955, and the unloading was completed at 6.50 p.m. on Wednesday, December 21, 1955. Between those times there were certain periods when rain was falling, and the rain was heavy enough to stop or prevent unloading operations, if such operations had been started or intended. But, in fact, the receivers' arrangements were such that no unloading would have been done in those periods, even if they had been periods of fine weather. Then, do the days on which rain fell count as full "weather working days" for the purpose of calculating the laytime and demurrage, or should deductions be made for the periods when rain was falling?

The plaintiffs contend that the principle is as set out in paragraph 15 (ii) of the agreed statement of facts, that is to say: "Deductions would fall to be made in drawing up the time-sheet "in respect of periods of rain occurring during the running of the "laydays only in the event and to the extent that such periods "of rain in fact served to prevent the work of discharging the "cargo."

The defendants contend that the principle is as set out in paragraph 16 (ii) of the agreed statement of facts, namely: "Deductions fall to be made in drawing up the time-sheet in "respect of all periods of rain occurring during the running of "the laydays and during which the weather was such that the "defendants would have been justified in suspending the work "of discharging the cargo if that work had been actually in "progress at the time."

The very experienced counsel who appeared in this case agreed that there is no binding decision on the point. There are, however, certain passages in judgments in decided cases which may tend to support the one contention or the other. I will refer to those passages.

First, there is *Branckelow Steamship Company* v. *Lamport &*

Holt,[1] in which the bad weather had, in fact, prevented working, so that the present issue did not arise to be decided. I think, really, the fair view of the judgment of Lord Russell C.J. is that he does not give any clear indication on either side with regard to the present issue. He said[2]: " A question of general import-" ance arose during the argument of this case, and was indeed " the question to which the arguments of counsel were mainly " directed; it is whether, when a part only of a weather-working " day is in fact used by the charterers, that part is to be counted " against them as a whole day or as part of a day, or whether it " is to be excluded from the calculation altogether." Then he examined the facts, and said: " On Tuesday, March 10, the day " began with heavy rain, and the captain did not suggest in his " evidence that there was not ample reason for the charterers' " men declining to work; the morning was not a weather-working " day. The weather, however, cleared up later, and in the " afternoon from 1 to 5.30 a considerable quantity of cargo was " loaded." Then he went on to deal with the question of what should be done as regards parts of days, and the rest is not material.

Then there is *Bennetts & Co.* v. *Brown*,[3] decided by Walton J. One question was whether an alleged usage or custom of the port of Valparaiso should be allowed to be proved or not. The expression " weather working days " was used to define the proper time for discharging, but the alleged Valparaiso custom was that if the day was a surf day, such day should not be counted in the time allowed for discharging, and that the harbour master should be allowed to decide what was a surf day and what was not. It was for that reason that Walton J. had to say something about what is a weather working day. He said[4]: " The first question " I have to consider is whether, as between the parties to this " charterparty, which was made in London, the charterers can " rely upon such a custom. The custom appears to me to give " a meaning to the words ' weather working days ' which is not " their plain and natural meaning. I may mention that, as far " as I can understand, the discharging did go on every day, " including those days which are called surf days. The conclu-" sion at which I have arrived is that ' weather working days ' " is a well-known phrase. Whether it is perfectly grammatical " and perfectly good English is not for me to consider; but it is

---

[1] [1897] 1 Q.B. 570; 66 L.J.Q.B. 382; 2 Com.Cas. 89.

[2] [1897] 1 Q.B. 570, 572.

[3] [1908] 1 K.B. 490; 24 T.L.R. 199; 13 Com.Cas. 110.

[4] [1908] 1 K.B. 490, 496.

1957

COMPANIA NAVIERA AZUERO S.A. *v.* BRITISH OIL & CAKE MILLS LTD.

Pearson J.

"a phrase, I think, which has grown into common use, and is "generally understood and has come to have an ordinary meaning "as part of the English language (at any rate, as part of the "English language which is used by men of business), and I "think it has a natural meaning, viz., a day on which the work "of discharge—it might be of loading, but in the present case "it is of discharge—is not prevented by bad weather. The "phrase might refer to half a day. Half a day might not be "weather working and the other half might be weather working, "but I think that that is the natural meaning of the words, and "I do not think that it is competent to the charterers in a "charterparty of this kind, worded as this charterparty is, to "put upon that expression a different meaning which, it is said, "the words by custom have obtained at the port of Valparaiso."

It would be possible to obtain some indication on the one side or the other from that case, and, indeed, it is possibly arguable that Walton J. was relying on the fact that the discharging did go on every day, including those days which are called surf days. Again, I think the fair view is that the question did not really arise there in the form in which it is presented in the present case, and although the expression of opinion, or the description of "weather working days" given in the judgment has to be taken into account, I do not think it can be relied on as conveying any decision on the point.

The next case is *Dampskibsselskabet Botnia A/S* v. *C. P. Bell & Co.*,[5] and the question there was whether days on which, owing to ice, loading could not commence were weather working days. It was held that such days were not weather working days. The decision was given by Bateson J., and referring to this present question he said[6]: "Mr. Pilcher says that there is only "one case—namely, *Bennetts & Co.* v. *Brown*,[7] where the words "'weather working day' have ever been interpreted. It is a "decision of my great master in the law, Walton J., and there"fore I pay unbounded respect to it. He says: 'I think it has "'a natural meaning, viz., a day on which the work of dis"'charge—it might be of loading, but in the present case it is "'of discharge—is not prevented by bad weather.' Mr. Pilcher "says that this was not bad weather, that ice is present very "often in beautiful weather; but I think that in this charter"party it is bad weather when ice prevents loading. Scrutton

---

[5] [1932] 2 K.B. 569; 48 T.L.R. 93; 101 L.J.K.B. 574; 41 Ll.L.Rep. 160.

[6] [1932] 2 K.B. 569, 575.

[7] [1908] 1 K.B. 490.

"L.J., in his book on Charterparties, 13th edition, page 365, says "that '"weather working days"' means days on which the "'weather allows working.' Personally, I do not see very much "difference between what Walton J. says and what Scrutton "L.J. says. I am satisfied in this case that the proper inter-"pretation of these words is that which I have given to them."

Next there is *Burnett Steamship Co. Ltd.* v. *Danube and Black Sea Shipping Agencies*,[8] in which there was a majority decision by Greer and Romer L.JJ., with Scrutton L.J. dissenting. Greer and Romer L.JJ. did not say anything which bears on the present question, but there are some passages bearing on the present question in the argument of Mr. W. L. McNair (now McNair J.) and in the dissenting judgment of Scrutton L.J. These are the material passages, because they show clearly what views were taken by Mr. W. L. McNair and by Scrutton L.J. at that time. Mr. W. L. McNair, arguing for the shipowners, said[9]: "This type of contract, which is the standard "form for berth contracts, differs from an ordinary charter-"party in that it does not provide for weather working days. "The arbitration proceeded on the assumption that it was only "necessary for the charterers to prove that rain occurred which "would prevent loading. The clause, however, contemplates "the actual facts and not a hypothetical state of facts. The "charterers are not entitled to an extension of the laydays unless "they can prove that they have been actually prevented from "loading by rain. (Scrutton L.J.): Was it not intended to give "the charterers fifteen weather working days as laydays? (Mr. "McNair): No. It was intended by the berth contract to give "the charterers fifteen days within which to load, and the time "lost owing to rain was to be added to the laydays. The term "used in the contract is 'time so lost' which appears to indicate "that time may be lost but cannot be added to the laydays "because it was not 'so lost.' It is not sufficient for the "charterers merely to prove that work was made impossible "through rain; they must also prove that time was actually lost "to the charterers through rain."

In order to explain that argument, I should refer to the wording of the contract, which appears in the headnote. It reads: "should any time be lost whilst steamer is in a loading "berth owing to work being impossible through rain . . . the

---

[8] [1933] 2 K.B. 438; 49 T.L.R. 553; 103 L.J.K.B. 44; 46 Ll.L.Rep. 231.

[9] [1933] 2 K.B. 438, 445, 447.

"amount of actual time so lost during which it is impossible to "work owing to rain . . . to be added to the loading time . . ."

It seems to me, if I may respectfully say so, obvious that there are two things which have to be proved to take advantage of that provision: first, that work was impossible through rain, and, secondly, that, for that reason, time was in fact lost, and Mr. McNair was, in this argument, drawing a distinction between that kind of provision and the ordinary expression "weather "working days." Scrutton L.J. was not inclined to agree that there was any such difference.

Then we come to the dissenting judgment of Scrutton L.J. I will read a fairly long passage, because I think it all bears on the present question. Scrutton L.J. said: "There may be cases, "and *Vergottis* v. *William Cory & Son Ltd.*,[10] to which we have "been referred, is one, where the ship has to go into a particular "dock which has regulations which require the charterer to have "cargo in the dock before the vessel is admitted; but that is "quite a different case. He may be liable for damages in such "a case for having contracted to load the ship in a dock and not "having the necessary cargo which the dock regulations require "before the ship can get in. There is nothing of that sort in "this case. This particular contract is: 'Cargo shall be loaded "'at the average rate of 400 units per running day.' The "'average rate,' of course, shows that the charterer need not "load 400 tons on any particular day; so long as at the end of "the fixed number of days he has loaded his cargo into the ship, "he has completed his contract, and he is not liable because on "certain particular days he did not load any cargo at all; and "as he is not liable if on a particular day he does not load any "cargo, obviously he need not so far as the charterparty is "concerned have any cargo there on that particular day. The "charterer is to load the ship at the average rate of 400 units "per running day, and the time he has for loading will depend "on the size of the ship, and will amount in this case to 15 days "13 hours, I call it 15 days for simplicity, Sundays and non-"working holidays excepted. If the 15 running days include a "Sunday it is not to be counted, if they include a non-working "holiday, whatever that may be, it is not to be counted, and "there is no question that it could not be contended that a "Sunday or non-working holiday must be included in the 15 "running days, because the charterer had no cargo alongside

---

[10] [1926] 2 K.B. 344; 96 L.J.K.B. 1002; 25 Ll.L.Rep. 64.

"on the Sunday, or no cargo alongside on the non-working "holiday. Then there comes another class of cases: What about "weather? The charterer is to have 15 days for loading. "Supposing it rains on the 15 days, is he to have only 15 days "for loading or is he to have any more? That is very frequently "dealt with by the clause saying that the charterer is to have "so many weather working days. In that case it is quite clear "that it would be no answer to say to the charterer, it is true "that Monday was not a weather working day, but inasmuch "as no cargo was alongside the ship on that day it must count "as a weather working day. That is quite clear, in fact Mr. "McNair does not attempt to dispute it."

Then, finally, we come to *Alvion Steamship Corporation Panama* v. *Galban Lobo Trading Co. S.A. of Havana.*[11] The headnote reads: "A charterparty for the carriage of sugar pro-"vided: 'Lay days at the average rate of . . . provided vessel "'can receive at these rates per weather working day, Sundays "'and holidays and Saturday afternoons excepted, shall be "'allowed to the said charterers (if steamer is not sooner loaded) "'for loading and waiting for orders . . .' There was an estab-"lished custom at the loading ports in question that the normal "working periods were eight hours on a weekday and four hours "on a Saturday:—*Held*, that a 'working day' was a length of "time consisting of a number of hours which, according to the "custom of the port, were usually worked at the port, and the "word 'weather' qualified it so that from the number of hours "which would be the ordinary hours of the port was to be "deducted the length of time during which the weather interfered "with the work."

The case was tried by McNair J., and in one paragraph[12] there are a few words which show what view he was taking of the present question: "On the other hand, on behalf of the "charterers it is said, in effect, that the whole conception of "the words 'working day' necessarily involves looking at the "times during which work is done, and when one is considering "'weather working day' the same approach is made: one has "to consider, as regards a particular day, whether during the "working hours the weather does, or would, interfere with the "loading or discharging, as the case may be." It is those words "or would" which show what his view was.

---

[11] [1955] 1 Q.B. 430; [1955] 1 Lloyd's Rep. 9; [1955] 1 All E.R. 457.

[12] [1955] 1 Q.B. 430, 438.

On the other hand, in the Court of Appeal, Lord Goddard C.J. gave the first judgment, and he said [13]: "Does the use of "the word 'weather' in front of those words 'working day' in "any way alter the construction which one would otherwise put "upon 'working day'? I think that it does to this extent. "First, 'weather working days' is an expression which appears "to have come into use in shipping matters at about the end of "the last century, somewhere about the 90's. There does not "seem to be any doubt between the parties as to what the word "'weather' means. It means from the working day, whatever "it may be, is to be deducted the time which the men are stood "off, or the loading is suspended, by reason of rain or other "weather conditions—for example, there might be a hurricane, "or something of that sort, to prevent work being done. It "simply means that the working day is to be reduced by the "time in which working is suspended by reason of the weather, "and therefore, I think, apart from any authority, the umpire "in this case calculated the demurrage on perfectly proper "lines."

That seems to be a strong expression of opinion on the one side, but it is subject to two points. First, he said: "There "does not seem to be any doubt between the parties as to what "the word 'weather' means." It would appear that the present question was not argued before the Court of Appeal in that case. Secondly, there was an express reservation by the Lord Chief Justice when he said: "No question is raised in the special case "as to whether charterers are bound to have cargo ready on a "day or at a time when weather prevented work, so I say "nothing about this." I think that reservation was intended to be a reservation, in substance, of the present question, and although the *Burnett* case [14] was not, apparently, cited, I am inclined to think that the wording of that reservation of the Lord Chief Justice was a reminiscence of what Scrutton L.J. said in the *Burnett* case. Whether that suggestion is right or not, I think the intention of Lord Goddard C.J. was to reserve the present question. Moreover, any decision on the present question, if it had been given in the *Alvion* case,[15] would have been obiter, because it was not necessary to the conclusion.

That is the somewhat difficult state of the authorities on this question. As there is no decisive authority, but some real, or apparent, conflict of opinions expressed in the cases, where the

---

[13] [1955] 1 Q.B. 430, 445.

[14] [1933] 2 K.B. 438.

[15] [1955] 1 Q.B. 430.

1957

COMPANIA NAVIERA AZUERO S.A. *v.* BRITISH OIL & CAKE MILLS LTD.

Pearson J.

question was only mentioned incidentally and did not have to be decided, I must consider and decide the question as best I can, and the question is: what is the proper meaning of the expression "weather working days"?

Mr. Ashton Roskill, for the plaintiffs, following expressions of opinion in his favour in the decided cases to which I have referred, used what may be called a negative approach towards the ascertainment of the meaning of the expression. He said that you start with a 24-hour day, and you proceed to cut it down by deducting any period of bad weather which, in fact, prevents or interrupts the work of discharging the ship. Using a convenient metaphor, he said: "If rain stops play, you make a "deduction; but if all that can be said is that rain would have "made play impossible if anyone had intended to play, then no "deduction is to be made." That puts his point very clearly.

Mr. Eustace Roskill, for the defendants, argued that the expression "weather working days" should be considered and interpreted in an ordinary manner, and that it is not and does not involve an exception in a technical sense, but is simply descriptive of the class of days by reference to which laytime is to be calculated.

In my view, what I have called the negative approach to the definition, stating what is excluded, may, indeed, have its uses at some stage, but it is not sufficient and one cannot rest content with it. One must consider what positively is a weather working day. Is it a day on which the weather permits relevant work to be done and relevant work is, in fact, done, both conditions having to be fulfilled in order to make a weather working day? That, to my mind, is plainly not right, because, if that were so, the receivers could extend the laytime by not working on a fine day, and then one of the two conditions would be unfulfilled. If the weather is fine on Monday, then Monday counts against the receivers as a layday, whether or not they make any use of it.

In my view, a correct definition of a "weather working day" is a day on which the weather permits the relevant work to be done, whether or not any person avails himself of that permission; in other words, so far as the weather is concerned, it is a working day.

In my view, also, the converse proposition must be on the same basis. A day is not a weather working day, it fails to be a weather working day, insofar as the weather on that day does not permit the relevant work to be done, and it is not material to inquire whether any person has intended or planned or prepared to do any relevant work on that day. The status of a day as being a weather working day, wholly or in part or not at all, is determined solely by its own weather, and not by extraneous factors, such as the actions, intentions and plans of any person.

That interpretation of the expression avoids what seems to me the absurdity of saying that a day afflicted with continual storms of rain, snow and sleet is to be counted as a weather working day if nobody had planned to do relevant work on that day.

That means that I agree with the view expressed in note 5 on page 364 of the 16th edition of Scrutton on Charterparties. Note 5 says this: "Extensions of loading time on account of "bad weather take two forms. In some charterparties the rate "of loading is calculated 'per weather working day.' In such a "case it is immaterial that the charterer has no cargo available "on a particular day if on that day bad weather would have "prevented loading. Other charterparties provide that any time "lost through work being impossible owing to bad weather is to "be added to the lay-days or is not to count. In this case the "charterer must prove not only that bad weather occurred, but "also that it did in fact prevent him from loading."

A similar note is to be found in the 14th edition of Scrutton on Charterparties, dated 1939, and one can see from the *Burnett* case [16] that Scrutton L.J. himself must have held the same view.

I have done the best I can to work out what the meaning is by ordinary principles of construction, and I think one must apply ordinary principles of construction in deciding what the phrase naturally means. Had there been a unanimous trend of opinion amongst all the commercial judges to the effect that a more artificial meaning should be given, I would have thought it right to follow that. But it is, to my mind, an artificial meaning which is suggested on the part of the plaintiffs here, and I think the meaning suggested on the part of the defendants is the correct one. I therefore decide this question in their favour.

Judgment for defendants on this point.

Solicitors: *Constant & Constant; Richards, Butler & Co.*

---

[16] [1933] 2 K.B. 438.

B.P. REFINERY (KENT) LTD. v. WALKER (VALUATION OFFICER).

C. A.

1957
Jan. 15, 16, 17, 18;
Feb. 19.

Lord Evershed M.R., Denning and Romer L.JJ.

Rates and Rating—Plant and machinery—Oil refinery—Topping unit —Whether a "still"—"Parts of a plant"—"In the nature of "a building or structure"—Meaning—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24 (1), *Sch. III—Plant and Machinery (Valuation for Rating) Order,* 1927 (*S.R. & O.*, 1927, *No.* 480), *Sch., Class* 4.

The fact that something is brought on to a hereditament ready made is not conclusive against its being a "structure" or "in the "nature of a structure" for rating purposes.

The appellant company were occupiers of premises used for refining crude oil. The process was one of distillation and condensation and was carried out upon a section of the company's premises called a topping unit. The valuation officer claimed that the whole of the topping unit was rateable as a "still" within Class 4 of the Schedule to the Plant and Machinery (Valuation for Rating) Order, 1927,[1] and, if that were wrong, that many of the component items of apparatus of the topping unit fell within the scope of class 4. The Lands Tribunal held that the items of apparatus called heat exchangers, condensers, coolers, reflux and product accumulators, a soda flash tower, catwalks and pipes, which formed part of the topping unit, were not rateable. The valuation officer appealed against that decision. The company appealed against the decision of the tribunal that an elaborate boiler unit could be broken up into its component parts and rated in respect of such parts:—

Held, (1) that in construing class 4 of the Plant and Machinery (Valuation for Rating) Order, 1927, it was legitimate to have regard to the Third Schedule of the Rating and Valuation Act, 1925.

Richard Thomas & Co. Ltd. v. *Monmouth County Valuation Committee and Assessment Committee,* 60 T.L.R. 298; [1944] 1 All E.R. 417 applied.

(2) That the whole topping unit was not rateable as a "still."

(3) That in order that the various items of the topping unit should be rateable under class 4 of the Third Schedule and under the Plant and Machinery (Valuation for Rating) Order, 1927, Sch., class 4, the item of plant must (*a*) be identified in the list set out in class 4 of the order, and (*b*) must constitute a building

---

[1] Plant and Machinery (Valuation for Rating) Order, 1927. Schedule. "*Classes of machinery and plant "deemed to be part of the heredita-"ment.*"
Class 4: "The following parts of a "plant or a combination of plant and "machinery whenever and only to "such extent as any such part is, or "is in the nature of, a building or "structure—. . . economisers; con-"duits; . . . stills; . . . tanks; towers "for . . . treatment . . ."

or structure or something in the nature of a building or structure and that the heat exchangers and coolers could not be identified with any item in the class 4 list and were not rateable, and that the condensers although identifiable with an item in class 4 were not structures and not rateable.

(4) That the catwalks and pipes were not within class 4 of the order nor could they be regarded as constituting a building or structure and were not rateable.

(5) (Denning L.J. dissenting) that the reflux and product accumulators while being "tanks" within class 4 of the order were not in the nature of a structure and were not rateable.

(6) That the flash tower was a "tower for treatment" within class 4 and a structure or in the nature of a structure and that the fact that the tower was brought to the site in one piece was not conclusive as to its not being a structure.

(7) That the individual items of the boiler unit which fell within class 4 and were structures were individually rateable although the boiler as a single unit was not.

Cardiff Rating Authority and Cardiff Assessment Committee v. *Guest Keen Baldwin's Iron and Steel Co. Ltd.* [1949] 1 K.B. 385; 65 T.L.R. 159; [1949] 1 All E.R. 27 and *Burton* (*Valuation Officer*) v. *Ogdens* (*Brighton*) *Ltd.* (1952) 23 D.R.A. 246; 45 R. & I.T. 470 considered.

Decision of the Lands Tribunal affirmed except in regard to the non-rateability of the soda flash tower.

Case stated by the Lands Tribunal.

B.P. Refinery (Kent) Ltd. (hereinafter called "the company") were the occupiers of premises in the Isle of Grain which they used for refining crude oil. They appealed against an assessment of the Central Kent County Valuation Panel in respect of the rateable value of the premises. The Lands Tribunal held, contrary to the contention of the valuation officer, that the topping unit, which was on part of the premises, was not a "still" within class 4 of the Plant and Machinery (Valuation for Rating) Order, 1927, and rateable as a whole. The tribunal held parts of the unit were rateable, but they held that the items of apparatus called heat exchangers, condensers, coolers, reflux and product accumulators, a soda flash tower, catwalks and pipes were not rateable. The valuation officer appealed against the tribunal's decision in respect of these items.

The tribunal also held that a boiler unit, not part of the topping unit, though not rateable as a whole, was rateable in respect of its component parts. The company appealed against that decision.

The relevant facts as found in the case stated are set out in the judgment of Lord Evershed M.R.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer. In 1927 when the Plant and Machinery (Valuation for Rating) Order, 1927, was made, this form of topping unit was not known, but the fact that it operates in a new way does not prevent it being within class 4 of the schedule to the order. The whole unit is a "still," since it is doing the work of a still, and if it is a structure, which it manifestly is, it is rateable: *Cardiff Rating Authority and Cardiff Assessment Committee* v. *Guest Keen Baldwin's Iron and Steel Co. Ltd.*[2] If the whole unit is not rateable, it is submitted that the heat exchangers, condensers, coolers, reflux and product accumulators, soda flash tower, catwalks and pipes are rateable. With regard to the condensers, the tribunal was wrong in treating these as individual units. They are fitted together and are together a functional unit which forms a structure and so is rateable. The tribunal was wrong in attaching importance to the fact that the soda flash tower was brought to the site in one piece. There is nothing to distinguish this tower from the heaters and stripping towers on the site, which were rightly held to be rateable. The manner of its construction is not material. Pipes over 6 inches in diameter are "conduits" and within the order.

Michael Rowe Q.C. and *W. L. Roots* for the company. Before the Rating and Valuation Act, 1925, came into operation all plant and machinery, except loose tools, was rateable. The object of the Act of 1925 was to take out of liability to rating all plant and machinery except the items specified in the Act. The person who alleges rateability must bring the item in question within the Third Schedule of the Act. That schedule eliminates from rating process plant and machinery unless it is in the nature of a building or structure. The order of 1927 substituted the schedule to the order for that in the Act, but the order cannot alter the Third Schedule to the Act. It is permissible to look at the Third Schedule to construe the schedule to the order: *Richard Thomas & Co. Ltd.* v. *Monmouth County Valuation Committee and Assessment Committee.*[3] The phrase "functional entity" is never applied to parts of a plant. The earlier classes in the order are very detailed. For an item of plant to be rateable the item must be identifiable in the schedule to the order. It is not legitimate to pin an old label on a new plant or to substitute a new list for the list in the order. If an item is within class 4 of the order it is necessary to show that it is a single structure or in the nature of a building or structure. Regarding the topping unit, it is not possible to say that it is a single building. This unit is not a still: *South Wales Aluminium Co. Ltd.* v. *Assessment Committee for the Neath Assessment Area.*[4] The Lands Tribunal is the judge of fact as to the individual items. Each heat exchanger is a separate item of plant; the fact that they are used in batteries does not make them a structure. The economisers are not in the schedule to the order. The position in regard to the condensers is the same. The order contemplates that there may be towers which are not structures or in the nature of structures. Whether the flash tower is a structure is a question of fact. With regard to the pipes, there is a distinction between pipes and conduits. If pipes are, as these are, simply process pipes, they are out of rating.

---

[2] [1949] 1 K.B. 385; 65 T.L.R. 159; [1949] 1 All E.R. 27.

[3] 60 T.L.R. 298; [1944] 1 All E.R. 417.

With regard to the company's appeal against the tribunal's decision that the parts of the boiler are rateable, the decision of the tribunal is revolutionary. Process boilers have always been regarded as out of rating. This decision will affect all boilers. It is not the intention as displayed in class 4 that a unit, which is not rateable as a whole, shall be broken down into component parts and such parts separately rated: *Union Cold Storage Co. Ltd.* v. *Southwark Assessment Committee.*[5] There is no authority for taxing the parts which are within class 4. This is the first time that an attempt has been made to split a boiler up into its component parts in this way. A boiler is no more a structure than a fuel economiser.

W. L. Roots followed.

Maurice Lyell Q.C. in reply. If the company's contention as to the boiler were right, a superheater, which is within class 4, could not be rated at all, since it cannot operate without a boiler. In 1925 superheaters were integrated with boilers. It is inevitable that in applying class 4 parts of a unit may be rated. If any article is named in class 4 and is a structure, or in the nature of a structure, it is rateable. There are many things in class 4 which are always part of a larger whole. [Reference was made to Lord Watson's observations in *West Derby Union* v. *Metropolitan Life Assurance Society.*[6]]

With regard to the first appeal, it is not contended that everything which is built up is a structure, but the distinction which the tribunal has drawn between the parts of the topping unit which are rateable and those which are not has no legal basis, and this appeal should be allowed as regards the items which have been held not to be rateable.

---

[4] [1943] 2 All E.R. 587.

[5] (1932) 16 R. & I.T. 160.

[6] [1897] A.C. 647, 652.

Cur. adv. vult.

February 19. The following judgments were read.

LORD EVERSHED M.R. (read by Denning L.J.). These two cases are appeals from the Lands Tribunal, pursuant to the Lands Tribunal Act, 1949, s. 3 (4), relating to the liability for rates of certain parts of premises occupied by B.P. Refinery (Kent) Ltd. (hereinafter called "the company"), or of the plant and machinery thereon. As the name of the company implies, the premises in question are used for the purpose of refining crude oil: and, as I understand it, the process of refining, put in broad and general terms, involves the breaking up or separating of the crude oil into certain "fractions" or groups of hydrocarbon substances having, as between them, different vaporisation or boiling points. The fractions or groups into which the crude oil is thus separated are, in an ascending order of their respective vaporisation or boiling points: Primary flash distillate, benzine, naphtha, kerosene, light gas oil, heavy gas oil, and reduced crude. The last named is, in fact, the residue of the oil after separation from it of the other six fractions; it constitutes in volume something in the neighbourhood of 50 per cent. of the original crude oil treated. The process is essentially one of distillation and condensation in which use is made of the differing vaporisation points above referred to, and it is carried out upon a section of the company's premises called a "topping unit" which covers in space a rectangle of approximately 250 by 295 ft.

The process of which I have stated the main characteristic is one of modern development and design and is in fact very complex. It requires the production and control of very considerable degrees of heat, amounting to as much as 750 degrees Fahrenheit at certain stages. The process has been described in great detail and with great care in the case stated, and both parties were agreed before us that such description is in every respect correct. In the circumstances it would be a waste of time for me to attempt in this judgment a repetition of that description. But in order to make this judgment clear it is necessary for me to refer to certain features or stages in the process, and it is also necessary to state at once that the process is continuous, the oil, or the severed components of the oil, passing continuously through a series of pipes which connect the individual parts of the whole topping unit. The oil and its components go, however, through a number of distinct and physically separate items of apparatus—fractionating towers, heaters, strippers, caustic soda towers, reflux and product accumulators, heat exchangers, condensers, coolers—to mention the majority but not all of them. The part of the refinery known as the topping unit is at the north-east corner of the refinery. The various units of apparatus are themselves identifiably distinct.

The main claim of the valuation officer put by him before the Lands Tribunal and in this court is that the whole topping unit should be regarded as a single entity, namely, a " still " within the meaning of that term as used in class 4 of the detailed Plant and Machinery (Valuation for Rating) Order, 1927. Before the Lands Tribunal the valuation officer alternatively contended that the whole unit constituted a " tower for oil refining and condensing " within the meaning of those words as also used in class 4 of the Order of 1927. These alternative claims were both rejected by the Lands Tribunal, and before us Mr. Lyell, for the valuation officer, has confined himself to the former of them.

The valuation officer further contended before the Lands Tribunal that (if the topping unit was not rateable as a single item, that is, on the ground that it was a " still " or tower for oil refining and condensing) nevertheless many of the component items of apparatus fell individually within the scope of class 4 of the order of 1927, being capable of identification with corresponding items in the order, and being in each case (as required by the order) a building or structure or in the nature of a building or structure. Upon this part of the valuation officer's argument before them the Lands Tribunal found in a number of instances in favour of the valuation officer. Thus (to take one example) they held that the heaters were, in truth, " stills " within the terms of the order and that they were rateable as such, being structures or buildings or in the nature of structures or buildings. In the case which I have instanced, and in the other cases where the Lands Tribunal similarly found in the valuation officer's favour, the company has accepted their decision before us. In certain other cases the valuation officer, in his turn, has before us accepted the rejection by the Lands Tribunal of his claim that certain other parts of the unit were rateable. But in seven instances the rejection by the Lands Tribunal of the valuation officer's contentions has been challenged before us by the valuation officer. These seven instances are those items of apparatus called heat exchangers, condensers, coolers, reflux and product accumulators, a soda flash tower, catwalks and pipes. In all these instances Mr. Lyell has argued in this court that, if the unit itself is not to be treated as a "still," the Lands Tribunal wrongly rejected his claim as regards these individual items. These contentions on the part of the valuation officer constitute the substance of the first appeal before us.

The second appeal relates exclusively to a large and elaborate boiler built, not on the topping unit, but on another neighbouring part of the refinery. The boiler appears to have been constructed by the firm of Spearing & Partners Ltd. It was the claim of the company before the Lands Tribunal that the boiler was a single individual unit which could not sensibly, for the purposes of rating, be broken up into its component parts: and that since no item occurs in class 4 of the order of 1927 naming a "boiler" or anything else with which the present boiler, as such, could be identified, this boiler of the company's escapes altogether liability for rates. In connexion with this argument, Mr. Rowe suggested before us that in one respect the order of 1927 might be ultra vires; and I shall have to return to this suggestion later; though, for reasons which will appear, I do not think it necessary to express my view upon it. For, as I have understood the argument of Mr. Lyell, if the boiler is not capable of any separation for the purposes of rating into its individual components, then it is not challenged on the part of the valuation officer that the boiler does as such fall outside the scope of class 4 of the order of 1927, and escapes altogether liability for rates. On the other hand, if the boiler can properly be broken up for the purposes in hand (as the Lands Tribunal held) then certain of its components—in truth, by far the greater part of them—can be identified with items in class 4 of the order of 1927; and, assuming that these components can further be regarded as buildings or structures or in the nature of buildings or structures (as the Lands Tribunal also held) then these components are separately rateable as such. The second appeal before us is an appeal by the company, in effect confined to the first question which I have indicated, namely, can the boiler be severed or broken up for the purposes in hand into its component parts? For the company has not challenged the conclusions of the Lands Tribunal as regards the structural nature of the individual parts if their severance be found legitimate.

I have sufficiently stated the general nature of the questions before us in these appeals, and I turn at once to make my references to the Rating and Valuation Act, 1925, and to the order of 1927. Section 24 (1) of the Act, as amended by the Local Government Act, 1948, s. 70 and Sch. I, is as follows: "For the purpose of the making or revision of valuation lists "the following provisions shall have effect with respect to the "valuation of any hereditament other than a hereditament the "value of which is ascertained by reference to the accounts, "receipts or profits of the undertaking carried on therein:— "(*a*) All such plant or machinery in or on the hereditament as "belongs to any of the classes specified in the Third Schedule to "this Act shall be deemed to be a part of the hereditament: "(*b*) Subject as aforesaid, no account shall be taken of the value "of any plant or machinery in or on the hereditament."

There is no question here of the hereditament being one the value of which is to be ascertained by reference to the accounts or profits of the undertaking. So far, therefore, as plant and machinery are concerned rateability depends upon the extent to which it is comprehended in the Third Schedule to the Act or the later order of 1927. I accept the correctness of Mr. Rowe's statement that, whereas prior to the Act of 1925 machinery and plant (other than loose tools) were generally taken into account in rating, the purpose of the Act was to exclude from rating liability what may broadly be called productive or trade process machinery, save so far as such machinery might be brought specifically within the scope of rating by the terms of the Third Schedule. This schedule is headed "Classes of machinery and "plant to be deemed part of the hereditament."

The first class is expressed as follows: "Machinery and plant "(together with the shafting, pipes, cables, wires, and other "appliances and structures accessory thereto) which is used or "intended to be used, mainly or exclusively in connexion with "any of the following purposes, that is to say:—(*a*) the generation, storage, primary transformation or main transmission of "power in or on the hereditament; or (*b*) the heating, cooling, "ventilating, lighting, draining or supply of water to the land "or buildings of which the hereditament consists, or the protecting of the hereditment from fire:

"Provided that, in the case of machinery or plant which is "in or on the hereditament for the purpose of manufacturing "operations or trade processes, the fact that it is used in connexion with those operations or processes for the purpose of "heating, cooling, ventilating, lighting, supplying water, or "protecting from fire shall not cause it to be treated as falling "within the classes of machinery or plant specified in this "Schedule."

I draw attention in passing to the final words of the proviso quoted, namely, "specified in this Schedule." It is upon these four words that Mr. Rowe's suggestion that the order of 1927 might in certain respects be ultra vires was founded: for, as the proviso stands, it would appear that manufacturing or trade process machinery was, as such, to be wholly excluded from rating, notwithstanding that it also served the purpose of heating, lighting, etc. within class 1 (*b*), and notwithstanding, also, that it might otherwise be identified within class 4. I need not pause to cite classes 2 and 3: but class 4 is expressed as follows: "Such part of any plant or any combination of plant and "machinery, including gas holders, blast furnaces, coke ovens, tar "distilling plant, cupolas, water towers with tanks, as is, or is "in the nature of, a building or structure."

Subsections (3), (4) and (5) of section 24 of the Act provide: "(3) For the purpose of enabling all persons concerned to have "precise information as to what machinery and plant falls within "the classes specified in the said Third Schedule, there shall "be constituted a committee consisting of five persons to be "appointed by the Minister, and the said committee shall as "soon as may be after the passing of this Act prepare a statement setting out in detail all the machinery and plant which "appears to the committee to fall within any of the classes "specified in the said schedule.

"(4) The committee shall as soon as the said statement has "been prepared transmit it to the Minister, who shall cause it to "be published in such manner as he thinks fit.

"(5) The Minister, after considering the statement and any "representations which may be made to him with respect thereto, may, if he thinks fit, make an order confirming it, with "or without modifications, and, subject as hereinafter provided, "the statement as confirmed by the order shall for all purposes "have effect as if it were substituted for the Third Schedule to "this Act."

Subsection (5) concludes with provisions for laying the confirmatory order before the Houses of Parliament, and subsection (6) envisaged the possibility of revision from time to time of the existing order.

It does not appear that practical effect has been given to this latter subsection, but in due course the committee contemplated by subsection (3) was formed and the result of their labours was the Plant and Machinery (Valuation for Rating) Order of 1927, being the order to which I have already made more than one reference. It would be tedious and wholly unnecessary to set out in this judgment the elaborate details comprehended by this order. A reference to it shows that, in the cases of class 1 and of class 4, the general terms of the Third Schedule to the Act were expanded by a wealth of detailed specification of types of machinery. In the case of class 1 the terms of paragraphs (*a*) and (*b*) to the Third Schedule were, in substance, repeated by way of introductory paragraphs; but in lieu of the four words "specified in this Schedule" in the proviso to paragraph (*b*) of the Third Schedule to the Act there appear the words in the corresponding part of the order "specified in the Schedule "*to this class*."

The effect of the variation in language, if within the competence of the order, is obvious; that is, on the face of it, a piece of plant or machinery which serves manufacturing or trade processes is not brought into rating liability by reason only of the fact that it serves also the purposes of heating, lighting, etc., but it will not be excluded from liability if it also falls, as such, within the scope of class 4 as a piece of plant or machinery identifiable by reference to the list given in the order and also being, or being in the nature of, a structure or building.

For the purposes of the present appeal, however, it is, in my judgment, unnecessary to consider whether this change of language was, in truth, ultra vires: it may possibly be that the change in language was not in fact unconnected with the omission in the detailed list in class 4 of the order of the word "boiler" or of any other word which would cover a boiler such as that with which we are concerned. But as I have followed the argument, Mr. Rowe's contention does not depend upon the language of class 1 in the schedule or in the order, but upon the simple proposition that the subject-matter of his appeal, the boiler, cannot anywhere be identified with the items in class 4 of the order, and being admittedly a piece of plant or machinery substantially, if not exclusively, established for manufacturing or trade processes, it is therefore outside the scope of rating, unless it can, for rating purposes, be sub-divided into its component parts, and these component parts or some of them can, in their turn, be identified with the terms in class 4.

It will be recalled that, according to the language of subsection (5) of section 24 of the Act, the order, when made, is for all purposes to "have effect as if it were substituted for the

"Third Schedule" to the Act. The question, therefore, at once arises whether it is legitimate, for the purpose of construing the order and determining whether any pieces of plant or machinery fall within its scope, to have regard to the Third Schedule to the Act. The answer to this question has been already provided for us by the decision in this court in *Richard Thomas & Co. Ltd.* v. *Monmouth County Valuation Committee.*[1] That case concerned certain electrical power machinery; but in the course of the judgment of this court delivered by Scott L.J. it was made plain that the language of the Third Schedule could still be consulted for the purposes of discovering liability for rates. "The language," he said[2] "of the Third Schedule gives the key." And again, a little lower down: "This key is of paramount importance for "unlocking the problem of the 'Statement'"—that is, the order of 1927—"on which the appeal depends; for the language "of section 24 (3) and (5) together clearly imports that the "'Statement' is to explain and not to alter the Third Schedule."

The intention of Parliament, as expressed in the opening terms of subsection (3) of section 24, was undoubtedly laudable, but its hopes may be said to have been somewhat over-sanguine. A descent into the realm of detailed description of all types and kinds of machines may, if the work of the committee was (as I assume) thoroughly done, well serve to illuminate all the dark places at the time when the catalogue was first composed: but during the passage of 30 years the ingenuity of man has brought into being many new types of machinery not dreamt of in 1927. The arguments in the present case—and to some extent the arguments in the reported cases to which we have been referred—create at least a suspicion in the mind that some of the expensive litigation that has taken place would have been avoided if the questions concerned had been left for determination on the general terms of the Third Schedule to the Act. It may, however, well be that, on the other side, many cases of doubt have been avoided by the order of 1927 and have, therefore, never reached the courts at all. It is none the less legitimate to suggest that there would be much to be said for a modern revision of the enumeration so elaborately put together 30 years ago.

However that may be, reference to the terms of class 4 in the Third Schedule to the Act, which has been held to be legitimate, will be seen to have a strong bearing upon the first question put forward by the valuation officer, namely, whether the whole topping unit can be regarded as a single entity, a "still." Those terms are, so far as relevant, "such part of any plant or any "combination of plant and machinery including . . . a tar "distilling plant." The words quoted strongly suggest in the first place that the subject-matter to be rated must be a part only of the entire plant; and, second, by giving as an instance of the totality of a plant that of a "tar distilling plant," they appear to negative the possibility that such a thing as a tar distilling plant could itself be regarded as a single rateable item. And it is difficult to see any sensible distinction between a tar distillation plant on the one hand and an oil distillation plant on the other.

---

[1] 60 T.L.R. 298; [1944] 1 All E.R. 417.

[2] [1944] 1 All E.R. 417, 419.

I have not so far referred to the composition of class 4 in the order of 1927. The considerable list of items of machinery is introduced by the words, borrowed from class 4 as it appears in the Third Schedule to the Act: "The following parts of a plant "or a combination of plant and machinery whenever and only "to such extent as any special part is, or is in the nature of, "a building or structure." The words obviously lend added emphasis to the view that the items intended to be made subject to rates are not collections of individual items making a "plant," but are rather the specific component items themselves—so far, of course, as they satisfy the second qualification of being, individually, structures or buildings, or of that nature. It is true that certain of the items in the list which follows (and which I do not think it is necessary to recite) might be complete in themselves, and not easily capable of being regarded as "parts" of some larger whole, for example, a windmill or a weighbridge. Even in these cases, however, the actual mill or the actual weighbridge would, presumably, be installed as a part of a larger whole, and would not be found in total isolation. But in any case I cannot think that the use of the word "still" in the context of the list in the order of 1927, introduced as it is by the words already quoted, and construed in the light of the "key" provided by the Third Schedule, can be meant to refer to so large a congeries of items as makes up the present topping unit.

We were referred to numerous dictionary definitions from which it may, no doubt, truly be said that in some contexts the word "still" could be used in this wider, embracing sense. But when I add to the considerations, to which I have alluded, a further reference to the general character of the whole unit, I can feel no doubt whatever in my mind that the Lands Tribunal rightly rejected Mr. Lyell's first contention that the whole unit is rateable as such as a "still," and capable, accordingly, of being sensibly regarded within the meaning of class 4 as constituting something in the nature of a single structure or building.

It becomes necessary, accordingly, to consider the correctness of the Lands Tribunal's findings as regards the heat exchangers and the other six items which I have already mentioned. One question of general importance calls at once for consideration, namely, to what extent should the conclusions of the Lands Tribunal upon these subject-matters be regarded as questions of fact? Upon this question guidance has more than once been provided by judgments of this court. In the case of the *Cardiff Rating Authority* v. *Guest Keen Baldwin's Iron and Steel Co. Ltd.*[3] the court was concerned with the liability for rating purposes of certain tilting furnaces. It was held that these items of plant were "furnaces" within the meaning of class 4 of the order of 1927, and were not the less structures or buildings, or of that nature, because they were "tilting," that is to say, not permanently fixed in a particular position.

In the course of their judgments both Denning L.J. and Jenkins J. discussed the kind of tests which should be applied by the rating authority. The relevant passages have been cited before in other subsequent cases, but it is convenient to set them out again in this judgment. Thus, Denning L.J. said[4]: "A "structure is something which is constructed, but not every- "thing which is constructed is a structure. A ship, for instance, "is constructed, but it is not a structure. A *structure* is some- "thing of substantial size which is built up from component "parts and intended to remain permanently on a permanent "foundation; but it is still a structure even though some of its "parts may be movable, as, for instance, about a pivot. Thus, a "windmill or a turntable is a *structure*. A thing which is not "permanently in one place is not a structure, but it may be "'in the nature of a structure' if it has a permanent site and "has all the qualities of a structure, save that it is on occasion "moved on or from its site. Thus, a floating pontoon, which is "permanently in position as a landing stage beside a pier, is "'in the nature of a structure,' even though it moves up and "down with the tide and is occasionally removed for repairs or "cleaning. It has, in substance, all the qualities of a landing

---

[3] [1949] 1 K.B. 385; 65 T.L.R. 159; [1949] 1 All E.R. 27.

[4] [1949] 1 K.B. 385, 396.

"stage built on piles. So, also, a transporter gantry is 'in the "'nature of a structure,' even though it is moved along its site. "It has the same qualities as a fixed gantry, save that it moves "on its site."

The relevant language of Jenkins J. is[5]: "It would be "undesirable to attempt, and, indeed, I think impossible to "achieve, any exhaustive definition of what is meant by the "words 'is or is in the nature of a building or structure.' They "do, however, indicate certain main characteristics. The general "range of things in view consists of things built or constructed. "I think, in addition to coming within this general range, the "things in question must, *in relation to the hereditament*, "answer the description of buildings or structures, or, at all "events, be in the nature of buildings or structures. That "suggests built or constructed things of substantial size: I think "of such size that they either have been in fact, or would "normally be, built or constructed on the hereditament as "opposed to being brought on to the hereditament ready made. "It further suggests some degree of permanence in relation to "the hereditament, i.e., things which once installed on the "hereditament, would normally remain in situ and only be "removed by a process amounting to pulling down or taking to "pieces. I do not, however, mean to suggest that size is necessarily a conclusive test in all cases, or that a thing is necessarily "removed from the category of buildings or structures or things "in the nature of buildings or structures, because by some feat "of engineering or navigation it is brought to the hereditament "in one piece. For instance, floating docks or pontoons, items "specifically mentioned in class 4, would not, I think, be "excluded merely on account of having been towed complete to "the hereditament instead of having been built or constructed "there. The question whether a thing is or is not physically "attached to the hereditament is, I think, certainly a relevant "consideration, but I cannot regard the fact that it is not so "attached as being in any way conclusive against its being a "building or structure or in the nature of a building or structure. "This is, I think, clearly shown by some of the items specifically "mentioned in class 4; e.g., floating docks and pontoons "would necessarily not be so attached. Nor can I regard the fact "that a thing has a limited degree of motion in use, either in "relation to the hereditament or as between different parts of "itself, necessarily prevents it from being a structure or in the

---

[5] [1949] 1 K.B. 385, 402, 403.

"nature of a structure, if it otherwise possesses the charac-"teristics of such. The list in class 4 includes such things as "elevators and hoists, transporter gantries, transversers and "turntables, and weighbridges. It is true that things in class 4 "are rateable only 'to such extent' as they are buildings or "structures, or in the nature of buildings or structures; but I "cannot regard this as necessarily excluding from rateability the "movable parts of things which from their inclusion in the list, "are clearly regarded as capable of being in the nature of "buildings or structures and from their very description must "clearly possess some degree of mobility in relation to the "hereditament or as between the different parts of themselves."

It is, I think, plain that neither Denning L.J. nor Jenkins J. was seeking to lay down exhaustive definitions. Rather, they were indicating by illustration and otherwise the kind of considerations which were proper to be borne in mind. So much was, indeed, said in terms by Somervell L.J. in the later case of *Burton* v. *Ogdens* (*Brighton*) *Ltd.*[6] The *Burton* case was concerned with certain baking ovens which the Lands Tribunal had found to be rateable within class 4 of the order of 1927. The appeal of the ratepayers was unsuccessful, all the members of this court being of opinion that the questions involved were substantially questions of fact with which the Court of Appeal would not interfere. At the end of his judgment Somervell L.J. referred to a further statement of my brother Denning in *British Portland Cement Manufacturers Ltd.* v. *Thurrock Urban District Council*,[7] in which, after referring to the *Cardiff* case,[8] my brother had said: "Once the principles of interpretation have "been settled, as they have been settled, the particular applica-"tion of them to any particular set of facts is essentially a "matter for quarter sessions." Somervell L.J. concluded his judgment as follows[9]: "If, therefore, I had felt some doubt "(which I have not) as to whether I would have decided this "matter in the same way, I would have thought it right to regard "it on the facts as found a question of fact for the Lands Tribunal "with which this court would not interfere."

The two cases, the *Cardiff* case[10] and *Burton* v. *Ogdens* (*Brighton*) *Ltd.*,[11] were both cited to the Lands Tribunal, who refer specifically to them in the case stated to this court. It is clear, therefore, that the "principles of interpretation" were brought to the attention of the tribunal, and considered by them. The tribunal heard a considerable quantity of evidence, and also, as I understand, twice visited and inspected the topping unit. In such circumstances I approach the consideration of the tribunal's conclusions on the seven items now remaining for consideration on the valuation officer's appeal with the view that, prima facie, such conclusions should be treated as matters of fact with which this court should be extremely slow to interfere. It is well to bear in mind that by the terms of section 3 (4) of the Lands Tribunal Act, 1949, itself—under which the present appeals are brought—it is provided that a decision of the Lands Tribunal should be final, with the proviso that a person "aggrieved by the decision as being erroneous in point of law" may require a case to be stated for this court. Mr. Lyell, indeed, conceded, in the course of his reply, that if the conclusions were reasonably possible conclusions on the facts and evidence before the tribunal, then this court should accept them as final. It has, moreover, to be remembered, as will become apparent when I pass to the matter of the heat exchangers, condensers and coolers, that in large measure the questions involved are questions of degree, and, as such, essentially matters for the final determination of the fact-finding tribunals.

---

[6] (1952) 23 D.R.A. 246.

[7] (1950) 114 J.P. 580, 582; 66 T.L.R. (Pt. 2) 1003.

[8] [1949] 1 K.B. 385.

[9] 23 D.R.A. 246, 260.

[10] [1949] 1 K.B. 385.

[11] 23 D.R.A. 246.

In the circumstances I can conveniently take together the first three of the seven items, namely, the heat exchangers, the condensers and the coolers. I observe that in each case two conditions must be satisfied for rateability under class 4 of the Third Schedule and the order, namely, (1) that the item of plant or machinery in question must be found or identified in the list set out under class 4 of the order, and (2) that the item, when so identified, must constitute, as such, a building or structure or something in the nature of a building or structure. Of the three items named, only one of them, namely, condensers, can readily be identified with any item in the list. That list includes "condensers (oil)" and the tribunal found no difficulty in so describing the condensers in the present case. But it was otherwise with the heat exchangers and coolers, since the list does not contain any express reference to either of these items.

The essential characteristics and functions of heat exchangers are set forth in paragraph 11 of the case stated. As there appears, a heat exchanger is a cylindrical object some 15 ft. in length and 2 ft. in diameter weighing approximately three-and-a-half tons. It consists of an outer shell inside which is found a number of tubes. The hot liquid is passed through the outer shell and the cool liquid in the opposite direction through the inner tubes, the effect being that the hot liquid heats the cold liquid in the tubes, its own heat being at the same time reduced by the contact. In order to prevent any wastage of heat, the heat exchangers, which are delivered as ready-made units on the site, are lagged and "cleaded." I may add here that in construction and dimensions both the coolers and condensers are not substantially different from the heat exchangers, save that in the two latter cases the cooling or condensing is produced by the use of cold water and not oil.

It was contended for the valuation officer that the heat exchangers could and should be identified with the item "economisers" in the list of class 4: and it is undoubtedly true that in construction and also in function the two things are very similar, save only that the purpose of the economiser is to use the hot fluid or gases that would otherwise go to waste in order to "pre-heat" the cold fluid or gases passing in the other direction. It is not concerned with the converse process or effect of using the cold fluid or gas to cool the hot, though inevitably such would be the practical result. Notwithstanding this similarity in construction and function, the evidence before the Lands Tribunal, including that of the expert witness for the valuation officer, was unanimous to the effect that no one concerned in the relevant trades would ever describe a heat exchanger as an economiser; and in face of that evidence it seems to me impossible to challenge the validity of the Lands Tribunal's conclusion that heat exchangers for the purposes in hand were not economisers.

In a final and valiant attempt to identify the heat exchangers and coolers with one or other of the items in the class 4 list, the valuation officer sought to say that these machines, whether regarded singly or when used (as in the case of the heat exchangers) in banks or batteries, constituted "chambers for "conditioning or treatment" on the simple ground that a chamber may by definition be called a confined room or space, and that in fact the external contours of the heat exchangers or coolers enclosed a space. The same argument was applied also to the condensers. Again, however, I can see no reason whatever for differing from the view taken by the Lands Tribunal. In common sense and in ordinary speech, I cannot think that these items can fairly be so described.

There remains the second necessary condition (in the case only of the condensers of practical significance, having regard to the tribunal's previous conclusions upon identification of the items with the items in the class 4 list), that is, the question whether they can, singly or as put together in banks or batteries, be regarded as structures. The heat exchangers are in fact grouped in batteries, the process being that the fluids, hot and cold, pass through all the exchangers in the battery in series, so that the process of heat exchange is not completed till the fluids have passed through the entire battery. There is obvious force in the argument, when illustrated by a photograph, that such a battery of items or machines constitutes at least something in the nature of a building or structure. But there is force, also, in the contrary suggestion that, though the framework into which the individual items are fitted is in the nature of a building or structure (and it is conceded that the company is rateable in respect of it), the conjunction of the various items is merely a matter of their convenient arrangement and that they remain, in truth, separate and individual pieces of plant. Moreover, although it was found that in the case of the condensers (which are disposed horizontally and not, like the heat exchangers, vertically) it would be a difficult matter to remove one condenser without disturbance of the whole battery, nevertheless they do remain wholly distinct and capable of individual replacement. In the circumstances the question is, to my mind, essentially one of degree and therefore, as I think, one of fact upon which the conclusions of the tribunal ought not to be disturbed.

I pass over for the moment the next two items of the seven in my list, namely, the reflux and product accumulators and the caustic soda tower, and pass to the last two items, the catwalks and the pipes: for I can deal with these last named briefly.

"Catwalks" is the name applied to the metal galleries which are attached to the various pieces of plant for the purposes of enabling inspection and manual adjustment, where necessary, to be carried out. It was sought on the valuation officer's behalf to say that they fell within the description of "platforms" in the formula "foundations . . . platforms and stagings for plant and "machinery." The tribunal was of opinion that the words "platforms and stagings" were limited by their context to platforms and stagings for the support of plant or machinery, and did not comprehend platforms merely used in connexion with plant and machinery as in the present instances. This question is, no doubt, a matter of construction, and therefore of law. In my view, however, the opinion of the tribunal in this respect was correct. It follows that the catwalks do not find a place in class 4 and are therefore excluded from rateability. I see, also, no ground for challenging the view of the tribunal that the pipes in the present case cannot fairly be assimilated with the "flumes "and conduits" mentioned in the list. The pipes with which we are concerned serve, in effect, the function of a conveyor belt in other types of plant and are very different in nature and essential characteristics from, for example, a gas pipe or conduit built into the ground. I add that I also entertain no doubt of the correctness of the tribunal's view that the catwalks and the pipes cannot in any case be regarded as constituting a building or structure or anything in the nature of a building or structure, and I therefore feel no hesitation in rejecting Mr. Lyell's appeal on these two items.

I now return to the reflux and product accumulators, the first of the two items in my list which I have passed over. The nature and functions of the accumulators are stated in paragraph 17 of the case; from which it appears that an accumulator is a metal tank 36 feet long, 8 feet in diameter, weighing 13 tons, and resting in a steel cradle on reinforced concrete piers. The tank was delivered to the site as a complete unit but (as stated in the case) it "is not intended to be moved and is just as much a "permanency as the rest of the plant."

The description of this tank bears a strong resemblance to the description given of the so-called settlers. The latter are in dimensions much the same as the accumulator. They also, having been brought to the site in one piece, rest on reinforced concrete piers. They "are not intended to be moved save for "renewal or on redundancy and to that extent are just as much a "permanency as the rest of the plant." They weighed, however, not 13 tons but 46.

It was the opinion of the Lands Tribunal that both settlers and the accumulators were "tanks" and fell, accordingly, within the list in class 4 of the order of 1927. But whereas the tribunal held the settlers to be structures. or in the nature of structures, they found that an accumulator was neither. I confess that I have felt some doubt whether the tribunal had based their distinction between the two things solely on the difference in weight: and, if so, whether such an exclusive test was justified in the light of the judgments of this court from which I have quoted. The Lands Tribunal in more than one place in the case stated refers to the phrase (used by Jenkins J. in his judgment in the *Cardiff* case [12] from which I have quoted) "feat of engineering." I agree with the view of my brother Denning (in the judgment which he is about to deliver, and which I have had the advantage of reading in advance) that it would not be right to treat as a necessarily satisfactory test the answer to the question whether a particular item of plant or machinery was in fact, or could be, brought to the site in one piece or "ready-made" without a "feat of engineering"; and that Jenkins J. did not intend that phrase as a definition. On the whole, however, I have come to the conclusion that I should regard this matter of the accumulators as properly one of fact, in so far as it is essentially one of degree; I am not, therefore, prepared to interfere with the decision as regards the accumulator.

But as to the last item, namely, the soda flash tower, I have in the end reached the opposite conclusion. It is necessary in order to prevent corrosion that there should be injected into the oil minute particles of caustic soda in a completely dry state. The function of the soda flash tower is that all traces of the water in which the soda had previously been mixed should be removed and the oil enabled to pass into the rest of the apparatus free of water but having the minute soda particles suspended in it.

The tower is some 25 feet high and delivered to the site in a single piece. It is there bolted to the ground and surrounded by a fireproof protection for the first 8 or 10 feet from its base upwards—this surround being from a practical point of view no less an essential part of the tower than is the brick surround of the primary tower. A reference to the photographs shows that this soda flash tower is one of several not dissimilar in general appearance and including the primary and secondary towers and the stripper, all of which were held (and are now conceded) to be in the nature of structures.

The valuation officer may, I think, have been somewhat embarrassed by his having suggested no less than five possible identifications for the tower in the class 4 list. For my part, however, I think the tribunal were well entitled to treat the tower as a "tower for treatment" within that list. Is it, however, a structure or in the nature of a structure? As I understand the tribunal's negative answer to this question, it was founded on the circumstance that the tower, being brought to the site in one piece, was not so heavy or so large as the accumulator, and fell, therefore, within the reasoning for the rejection of the accumulator, for example, that the bringing to the site of the tower in a single piece could not be described as a "feat of engineering."

---

[12] [1949] 1 K.B. 385.

I have felt great hesitation upon this matter whether I should not, as in the previous instances, treat it as a question of fact. On the whole, I have felt unable to resist the conclusion that the tribunal in this instance did not (for reasons already indicated) apply the proper test—in other words, that they treated the single question of mobility as really conclusive. I cannot in this case think that such a test was right or was, indeed, in conformity with the judgments in the *Cardiff* case.[13] If regard is had to the nature of this tower, as it is shown by the photographs, it seems to me that the conclusion is really inevitable that the tower was, like the other large towers in the unit which I have mentioned, in the nature of a structure. Put otherwise, there seems to me to be not a similarity, but an essential difference, between a tower set up and bolted to the ground, with fire-protecting covering constructed round 8 or 10 feet of its base and reaching to a height above that of a small house, on the one hand; and on the other, a tank resting upon concrete piers, which piers are admittedly themselves structures or in the nature of such. In this one instance, therefore, I would allow Mr. Lyell's appeal and hold that the soda flash tower should be regarded as falling within the scope of class 4 of the order of 1927.

There remains the cross-appeal. I have referred already to the nature of the question involved and to the suggestion made by Mr. Rowe that the order of 1927 might be ultra vires, in so far as it purported to limit the exemption from rateability of plant or machinery used for manufacturing purposes or trade processes to exemption under class 1 only. Though it is in the event unnecessary for me to express a concluded opinion, I think for my part that there would be much force in the argument that it would not have been competent for the order of 1927 to include such plant or machinery, as such (that is, as a single item specified or identifiable in the list under the class) under class 4. But the order has not done so. It is no part of Mr. Lyell's argument that the boiler as such is so comprehended under class 4 of the order. And, whatever be the answer to Mr. Rowe's point, I do not think it was ultra vires for the committee or minister to include in class 4 items which, being individually structures or in the nature of structures, were component parts of a piece of plant or machinery which in its totality was exempted by the Third Schedule to the Act.

---

[13] [1949] 1 K.B. 385.

I have personally felt some sympathy for the view put forward by Mr. Rowe that you could not sensibly, for the purposes in hand, split up the boiler into component parts; that it was and is a single indivisible piece of plant, namely, a boiler. But, as I have earlier said, Mr. Rowe did not (as I followed him) challenge the validity of the tribunal's findings, as findings of fact, that the several items were not only identifiable with items in the class 4 list in the order of 1927, but were also, all of them, structures or in the nature of structures. This concession seems to me in the present case to be conclusive against the cross-appeal—and none the less so because, in sum, the several items make up by far the greater part of the whole boiler. The items are, severally, parts of a plant which fall within the descriptions in class 4 and are structures or in the nature of structures. They are, therefore, individually rateable, although the plant as a single unit is not.

I would, therefore, dismiss the cross-appeal; and dismiss also the appeal save for the single instance of the soda flash tower.

Denning L.J. Much depends in this case on the true interpretation of the order of the Minister of Health made in 1927. In construing that order it is, I think, legitimate to look at the Third Schedule to the Act. After all said and done, it is the Third Schedule which Parliament itself considered. Parliament there set out the broad principles and left it to the committee to work out the details. If the committee went beyond its terms of reference and included details not warranted by the principles laid down by Parliament, then to that extent their statement would be ultra vires. Although the statement was confirmed by the Minister, it would not be saved by the provision that, as confirmed, it "shall for all purposes have effect as if "it were substituted for the Third Schedule." Parliament only intended the statement to have that effect on the assumption that the committee kept within their terms of reference without any misunderstanding of them. It is true that the Minister's order was laid before Parliament, and no address presented against it, but that is very different from it being considered by Parliament. It is still open to the Queen's courts to examine the order to see if it conforms to the general principles laid down by Parliament and is within the powers conferred by it: see

Minister of Health v. *The King, On the prosecution of Yaffe*[14] and the Report of the Committee on Minister's Powers ((1931–1932), Cmd. 4060), p. 40. In these circumstances the right way to interpret the order is this: The order is the operative instrument. It gives the details of all the plant and machinery that can be rated. Nothing can be added to it by looking at the schedule; but, in case of difficulty, it is permissible to look to the schedule to explain it: see *Richard Thomas & Co. Ltd.* v. *Monmouth County Valuation Committee*,[15] *per* Scott L.J.; but if the order should seek to rate plant and machinery which is not warranted by the Third Schedule, as properly construed, then to that extent the order would be ultra vires.

Turning now to the details, I come first to the word "still." If the word "stills" in the order were construed by itself, without regard to the Third Schedule, I should have thought that the whole of this oil distillation plant—from the point where the crude oil starts to be heated to the point where the condensed vapour leaves the cooler—might properly be described as a "still": but when I see that in the Third Schedule there is mention of a "tar distilling plant," I come to the conclusion that in this order the word "still" refers only to the vessel or retort or container which is heated and not to the rest of the plant. That is a perfectly correct technical meaning which should be adopted. If the committee had intended to apply it to the whole of the plant, they would have used the words "oil distilling "plant" (following the Third Schedule) and not the word "stills."

Next I come to the separate components of the plant. The question in nearly every item is whether it is "in the nature "of a structure." Mr. Rowe submitted that the findings of the tribunal were findings of fact which could not be challenged in this court. I do not think he is entirely correct about this. The primary facts are all found by the tribunal and are not in dispute. The only question is what is the proper inference or conclusion from the primary facts. If the tribunal, in coming to its conclusion, discloses by its reasoning that it has misunderstood or misinterpreted the words of the statute, then it falls into error in point of law. Even if it does not disclose its reasoning, but asserts a conclusion which could not reasonably be entertained by a man who properly understood the meaning of the statute, then again it falls into error in point of law. There is, however, a considerable area where two reasonable men, each of whom properly understood the statute, could reasonably come to different conclusions. In such cases, the mere fact that the tribunal comes to a different conclusion from that to which some of the members of this court might come does not mean that the tribunal falls into an error in point of law. The question is then one of degree in which the tribunal of fact is supreme so long as it does not step outside the bounds of reasonableness. This is, I think, all shown by the decision of the House of Lords in *Edwards* v. *Bairstow (Inspector of Taxes)*,[16] which seems to confirm authoritatively the principles laid down in *Bracegirdle* v. *Oxley, Bracegirdle* v. *Cobley*,[17] and *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[18] and applied by this court in cases about these very words "in the nature of a structure" in *Cardiff* v. *Guest Keen*,[19] *British Portland Cement Manufacturers Ltd.* v. *Thurrock Urban District Council*,[20] and *Burton* v. *Ogdens (Brighton) Ltd.*[21] In several passages of the case stated the tribunal seem to have regarded it as a characteristic of a structure or the nature of a structure that it should be built up from component parts on the spot: and, in consequence, that, if a part of the plant was brought to the site all in one piece, it could not be said to be of the nature of a structure, unless it was brought there by some "feat of engineering." Those words were used by Jenkins J. in the *Cardiff* case,[22] but I am sure he did not mean them to be used as a definition: and it is misleading so to use them. Many will remember seeing prefabricated houses being transported on lorries. When erected they were structures or in the nature of structures, but it did not require a "feat of engineering" to transport them to the spot. This illustration brings out the point. It is, I think, a characteristic of a structure that it is built up of component parts on the site. But a thing may be in the nature of a structure, even though it is not built up on the site, but is brought there all in one piece. The nature of the thing depends on its characteristics when erected, not on whether it requires a feat of engineering to bring it there. Take, for instance, the soda flash tower. It is 25 feet high, 4 feet in diameter, weighs 9½ tons,

---

[14] [1931] A.C. 494; 47 T.L.R. 337.

[15] 60 T.L.R. 298; [1944] 1 All E.R. 417, 419.

[16] [1956] A.C. 14; [1955] 3 All E.R. 48.

[17] [1947] K.B. 349; 63 T.L.R. 98; [1947] 1 All E.R. 126.

[18] [1949] 1 K.B. 434, 462; 65 T.L.R. 103; [1949] 1 All E.R. 21.

[19] [1949] 1 K.B. 385.

[20] 66 T.L.R. (Pt. 2) 1003.

[21] 23 D.R.A. 246.

[22] [1949] 1 K.B. 385

is bolted to the ground and surrounded at its base by a fireproof wall 8 or 10 feet high. If it had been built up on the site, it would be regarded by everyone as a structure, just as much as a "water tower with tank" (which is expressly mentioned in the Third Schedule). Although this tower was not built up on the site, it is of the same nature as if it had been. It is of the nature of a structure and is rateable.

By contrast take the condensers. They are cylinders filled with a bundle of tubes. They are 16 feet long, nearly 3 feet in diameter, weigh 3¼ tons and are placed horizontally one above the other. No one looking at one of those by itself would say it was a structure or in the nature of a structure. It is just a piece of plant. Then does the fact that there are 12 of them, connected in series, make any difference? I think not. They are just 12 pieces of plant connected together. Likewise, the heat exchangers and the coolers which are similar in nature and size to the condensers.

Next I come to the item which has troubled me most. It is the accumulator, which is a metal tank 36 feet long, 8 feet in diameter, weighing 13 tons and resting in a steel cradle on reinforced concrete piers. Contrast this with the crude settler, which is a metal tank 38 feet long, 9 feet in diameter, weighing 46 tons and rests on reinforced concrete piers. The only appreciable difference between these two tanks is that the crude settler weighs 46 tons and the accumulator 13 tons. Yet the Lands Tribunal has found that the crude settler is in the nature of a structure, but that the accumulator is not. The reason the tribunal give for the distinction is that the transport of the crude settler to the site should be regarded as a "feat of engineering," but that the transport of the accumulator could not be so regarded. I do not think that is the right test. I should have thought it was a feat of engineering in each case. In any case, it is a mistake to substitute the test "feat of engineering" for the words of the statute. I should have thought that each of these enormous and permanent tanks was in the nature of a structure just as much as "water towers with tanks" mentioned in the Third Schedule.

Another matter that has troubled me a little is the great pipes that carry the liquid from the top of the tower to the bottom. If they had been "conduits," I should have thought they were rateable. They are in the nature of a structure, just as oil pipe lines that are laid underground: but I am inclined to think that these particular pipes would not ordinarily be described as " conduits " and are therefore not rateable. Upon all the other components of this plant, I agree with all that the Master of the Rolls has said.

I come to the cross-appeal about the boiler unit. Mr. Rowe says that it is a process boiler to produce steam for the processes of refining oil—as distinct from a heating boiler (for example, to supply central heating) or a power boiler (for example, to drive machinery)—and that a process boiler is not rateable. If it were permissible to look at the Third Schedule (without reference to the order), I would agree that a process boiler does not come within class 1, but I see no reason why it should not come within class 4. The proviso to class 1 makes it clear that process boilers are not brought within class 1 simply because they are also used for heating water: but it leaves it open for them or any parts of them to be brought within class 4, if they are structures or in the nature of structures.

Turning now to the order (which is the operative instrument) the strange thing is that boilers are expressly mentioned in the details to class 1, but not at all in the details to class 4. I cannot understand this. I should have thought that the committee, when engaged in working out the details of class 4, would have included such part or parts of a boiler as is a structure or in the nature of a structure. Nevertheless, in view of its omission from class 4, it is plain that a process boiler cannot be rated as such. But I see no reason why the several parts of a process boiler should not be rated under class 4, if they can properly be brought within it. The furnace, the flues. the economiser and the soot hoppers all come within the details specified in class 4. They are all structures or in the nature of structures, and are not less so because they are attached to other structures which are not rateable. They are therefore rateable. I think the Lands Tribunal were right on this matter and would dismiss the cross-appeal.

Romer L.J. I have had the advantage of reading in advance the judgment which the Master of the Rolls has delivered. I agree with the conclusions at which he has arrived and with the reasons upon which they are based.

Mr. Lyell's main submission on behalf of the valuation officer was that the greater part of the unit of the oil refinery at the Isle of Grain, which is referred to in the case as the crude distillation unit or topping unit, constitutes a functional entity which is a " still " and which is rateable as such under class 4 of the order of 1927. I am quite unable to accept this contention. It is true that in some contexts and for some purposes the word "still" has a wider meaning than that of a retort or other vessel used for purposes of distillation; and that it may comprehend an entire distilling apparatus. It appears to me, however, difficult in the extreme to regard the extensive and complicated distillation plant which is now in question, comprising as it does all the units of equipment, as a "still" for the purposes of class 4 of the order. The word, as there used, is clearly referable to a part only of a distillation plant just as, for example, the words "condensers—tar" in class 4 are descriptive of parts of "tar "distilling plant" which is mentioned, as a comprehensive entity, in class 4 of the Third Schedule.

In any case it seems to me that no part of a plant is rateable under class 4 of the order unless it is a building or structure, or in the nature of a building or structure. Anything that consists of a number of separate buildings or structures cannot be rated under class 4 on the ground only that it comprises a part of a plant. A glance at plan B (which forms part of the case) shows clearly enough the difficulty of regarding the topping unit as an individual building or structure or as being of the nature thereof; and such indeed was the view of the Lands Tribunal.

The tribunal (who obviously took very great trouble over this case) visited the premises twice, and as a result of their inspection expressed the following opinion (paragraph 31 (d) of the case): "It seemed to us that where there were a number of "entirely separate pieces of plant placed at intervals over an "area 250 ft. by 295 ft., each with its particular function and, "in the case of the pumps, housed in two entirely separate "buildings at a distance of more than 50 yards from each other, "it was impossible to describe the whole as being a building or "structure or in the nature of a building or structure merely "because the different parts were connected by pipes to enable "the raw material to be carried from one part to another even "though that interconnection was necessary to the proper work-"ing of the whole. In our view anyone looking at the unit "would regard it as a number of separate pieces of plant and "buildings or structures housing or forming part of the plant." I agree with these views of the Lands Tribunal and have no difficulty in rejecting the appellants' argument that the topping unit is rateable as a "still."

It, therefore, becomes necessary to consider the liability to rates of the various component parts of the unit which, after concessions and counter-concessions have been made, still remain in dispute. Of these I have nothing to add to what the Master of the Rolls has said except for a word or two with regard to the reflux and product accumulators and to the soda flash tower. I agree with the Master of the Rolls that we should not disturb the finding of the tribunal with regard to the accumulators, even though we ourselves might perhaps have taken a different view. The tribunal's decision in differentiating between the crude settlers on the one hand and the accumulators on the other has been criticized as irrational. They had, however, the advantage of seeing these respective units and I am not persuaded that they erred in principle in deciding a question which is, after all, one of degree. It is now established that such questions are essentially within the province of the Lands Tribunal to decide; and I would refer to the judgment of Birkett L.J. in *Burton* v. *Ogdens (Brighton) Ltd.*[23] where, after citing Jenkins J.'s observations in the *Cardiff* case[24] as to the characteristics of "structures," the Lord Justice said[25]: "When I read the immense detail in "the case stated and the specific findings dealing with those "characteristics, and realize that the Lands Tribunal, having "the *Cardiff* case[26] before it followed it very closely, I cannot "think that there is any ground on which this court could "interfere with its decision." So also on this matter of the accumulators, I do not think that this court should interfere.

On the other hand, the question whether the soda flash tower is properly to be regarded as being in the nature of a structure is not, as I think, merely one of degree. This tower is 25 feet high, 4 feet in diameter, and weighs 9·5 tons. It is bolted to the ground at ground level and after erection was surrounded at its base by a fireproof protection for the first 8 or 10 feet. The tower could not stand without being bolted to the ground and it clearly possesses the quality of permanence. In these circumstances, I should have thought myself that it is plainly in the nature of a structure. The tribunal adopted the contrary view, solely, it seems, on the ground that its transport to the site as a single entity did not involve a feat of engineering. In my judgment this one consideration is insufficient to displace the others to which I have referred, and I would allow the appeal so far as it relates to this unit.

There remains the question of the boiler. This is unquestionably a process boiler and is, as such, exempted from liability to

[23] 23 D.R.A. 246.

[24] [1949] 1 K.B. 385, 402.

[25] 23 D.R.A. 246, 261.

[26] [1949] 1 K.B. 385.

rating under the joint effect of section 24 and the proviso to paragraph 1 (*b*) of the Third Schedule to the Act of 1925. Although it is not necessary to decide the point, it accordingly appears to me that it would have been ultra vires the committee, which was set up under section 24, to have included process boilers as rateable subjects by their own order; for so to have done would have overridden the exemption granted by the Act—which cannot be superseded by the committee's order (*Richard Thomas & Co. Ltd.* v. *Monmouth County Valuation Committee*[27]). The committee did not in fact include process boilers in the order of 1927, but the question arises whether they could properly include in that order such parts of process boilers as are in the nature of structures—even though, by so doing, they could virtually eliminate (as in the present case) the exemption afforded to the process boilers themselves. This depends on the true construction of paragraph 4 of the Third Schedule to the Act. Does "any plant" in that paragraph inferentially exclude plant which has itself been exempted by the proviso to paragraph 1 (*b*)? Or does paragraph 4 include structural parts of any plant whatever? If the former, then the committee could not rate parts (even though structural) of process boilers; if the latter, they could. I see no sufficient reason to qualify the apparent generality of the words "any plant" in paragraph 4 of the Third Schedule. If Parliament had wanted to extend to the parts of process boilers the exemption just previously conferred on the boilers as units one would have expected an express provision to that effect.

Accordingly, if the "parts of a plant" which are dealt with by class 4 of the order of 1927 were intended to include parts of process boilers, such inclusion could not be challenged on the ground of ultra vires. But as a question of construction of the order of 1927 ought the parts of boilers referred to in class 4 to be confined to parts of non-process boilers, having regard to the proviso to class 1 (*b*) of the order? That proviso exempts from the Schedule to class 1 (*b*)—but not from the Schedule to the order—process boilers and their accessories. I do not think that there is any more reason for cutting down the apparent generality of the words "the following parts of a plant" in class 4 of the order of 1927 than there is for qualifying "such part of any "plant" in paragraph 4 of the Third Schedule to the Act of 1925. It appears to me accordingly (a) that on the construction of the order of 1927 "parts of a plant" in class 4 include such parts of a process boiler as are therein specified (provided, of

---

[27] 60 T.L.R. 298; [1944] 1 All E.R. 417.

C. A.
1957

B.P. Refinery (Kent) Ltd. v. Walker (Valuation Officer).

Romer L.J.

course, that they are of a structural nature), and (b) that such inclusion is not in conflict with the Act of 1925. The only remaining question is whether such parts escape from liability if they constitute integral parts of the boiler itself. I can find no sufficient ground for exempting them merely because they are incorporated integrally in the boiler. It seems to me that a boiler like that in question is "plant" and that, for example, a superheater is no less a "part" of that plant because it is built into it; indeed, such a superheater is in some sense more a part of the boiler than one which is built separate physically from the boiler. An axle is a part of a motor-car, even though it is an integral part of the chassis, and cannot very well be separated from it.

It might indeed be doubted whether an integral part of a boiler could be truly described as being in the nature of a structure, but the tribunal have found that the relevant parts of the boiler in this case possess that characteristic and Mr. Rowe, for the company, is not contesting this, if he is wrong on his other points.

It appears to me, accordingly, that the decision as to the boiler should be affirmed.

Appeal dismissed except as to the soda flash tower. Cross-appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Linklaters & Paines; Solicitor of Inland Revenue.*

B. A. B.

1957
April 30;
May 1.

McNair J.

KELSEN *v.* IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND) LTD.

Trespass — Airspace — Projection from building — Advertising sign — Whether invasion of airspace by projection trespass or nuisance — Whether damages or injunction appropriate remedy.

Landlord and Tenant—Parcels—Airspace—Presumption that airspace above demised premises is itself demised.

Injunction — Trespass — Airspace — Sign overhanging premises — Mandatory injunction.

An advertising sign erected by the defendants projected into the airspace above the plaintiff's single-storey shop. In an action for a mandatory injunction to remove the sign on the ground of trespass, the defendants alleged, inter alia, that an invasion of superincumbent airspace did not amount to a trespass, but only to nuisance, and that, on the facts, no nuisance existed:—

Held, that the invasion of the plaintiff's airspace was a trespass and not a mere nuisance, and it was a proper case in which to grant a mandatory injunction.

Gifford v. *Dent* [1926] W.N. 336 and *Wandsworth District Board of Works* v. *United Telephone Co. Ltd.* (1884) 13 Q.B.D. 904 applied.

Pickering v. *Rudd* (1815) 4 Camp. 219 not followed.

ACTION.

The plaintiff, Joel Kelsen, a retail tobacconist owning a number of shops, was the lessee of a tobacconist's shop at 407 and 407b, City Road, Islington, in the County of London, which consisted of a one-storey single ground floor shop, 10 feet deep and 20 feet in length, with a flat roof on top of the same dimensions, through which there was a skylight, which was never used by the plaintiff. The airspace above the flat roof extended upwards usque ad coelum past some two storeys, about 40 or 50 feet, of the adjoining premises, 409. The shop was at the corner of City Road, bounded on the front two sides by the street, and at the back by the wall of 409, on one side, and flanked on the other side by a wall of another property. The freehold of the corner site occupied by the plaintiff's shop was held by the Improved Industrial Dwellings Co. Ltd. That company had granted a lease of the premises for use as a tobacconist's shop and in April, 1946, the plaintiff took an assignment of that lease and continued in possession until a new lease was granted to the plaintiff dated December 21, 1948, which took effect from December 25, 1948, for a term of seven years. During the currency of the first lease the Imperial Tobacco Co. (of Great Britain and Ireland) Ltd., the defendants, had displayed on the wall of 409 above the one-storey tobacconist's shop three advertising signs composed of sheet metal mounted on a frame, the whole being fixed flush against the wall but protruding from the wall some 4 inches. In April, 1948, they wished to put up a new sign and they accordingly communicated with the owners of 409 asking for their permission to do so. On April 23, 1948, solicitors for the owners of 409 wrote to the freeholders of 407 and 407b asking whether they had any objection to the substitution being made. On April 26 the Improved Industrial Dwellings Co. Ltd. wrote: "This company will have no objection to the advertisement "shown on the sketch returned herewith being substituted for "the existing sign." The defendant company then carried out a preliminary survey of what work was required, but nothing was done until the beginning of January, 1950, when a fresh approach was made by the defendants to the owners of 409 and their solicitors, in turn, took the matter up with the freeholders of 407 and 407b and wrote, referring to the previous correspondence: "Nothing, however, has been done by the Imperial Tobacco Co., "but they have now sent us a sketch which is slightly different "from the one which we submitted to you in April, 1948, and "which we also enclose marked No. 2. Will you please return "both plans to us and at the same time let us know, if such "be the case, that you have no objection to the work on Plan "No. 2 being carried out." On January 9, the Improved Industrial Dwellings Co. Ltd. wrote: "In reply to your letter "of the 4th instant there will be no objection from this company's point of view for your clients, the Imperial Tobacco "Co., fixing the new advertisement sign on the above buildings, "provided always that any damage done to this company's "property will be made good at their expense." Following on that permission and (as McNair J. found) with the knowledge of the plaintiff, the sign was in fact put up in November, 1950. It consisted of the words "Players Please" and the maximum distance by which the front of those letters projected from the wall was 8 inches. The total length of the sign was about 20 feet and it had a maximum height of 8 or 10 feet. The cost of the material and the erection of the sign was £220. In addition the defendants paid to the freeholders of 409, £30 a year under an agreement by which they had the right to affix the sign to the wall of 409 for a period of seven years. From time to time the defendants' employees had access from the plaintiff's shop to the sign displayed on the wall above it, and carried out maintenance and repairs with the plaintiff's knowledge. By letter dated December 1, 1953, the plaintiff, for commercial reasons, gave notice to the defendants to remove the sign, but shortly thereafter told a representative of the defendants that it could stay. After certain further differences had arisen between the parties the plaintiff, by letter dated August 24, 1955, gave the defendants formal notice to withdraw the sign from above the shop. Agreement not being reached the plaintiff issued the writ in the action.

The plaintiff alleged that by affixing the sign the defendants had trespassed on his airspace and he claimed a mandatory injunction to order the defendants to remove the sign.

1957

KELSEN
v.
IMPERIAL
TOBACCO CO.
(OF GREAT
BRITAIN AND
IRELAND)
LTD.

The defendants alleged that the plaintiff had never had demised to him the airspace above his one-storey shop, and, accordingly, the whole claim failed, or alternatively, that if the airspace was conveyed to the plaintiff he was not entitled to the remedy which he sought on the following grounds. First, that by the terms of his lease, whatever rights in the airspace were conveyed to him, those rights were subject to any prior right having been granted by his landlord to other parties for the use of the airspace, and they relied on the fact that before the lease dated December 25, 1948, was granted to the plaintiff, his landlords had granted permission to the owners of 409 to have the sign fixed on their wall above the shop. Secondly, that as long as the landlords of 407 and 407b did not withdraw their consent, the plaintiff himself, who knew that the sign was going up and was being maintained, had no right to withdraw the implied licence, which he might be said to have given, so long as there continued in existence the express licence from the landlords, on the ground that the plaintiff had created a position which operated as an equitable estoppel against him. Thirdly, that, in any event, the plaintiff's remedy, if any, was for nuisance and not trespass, because a mere invasion of superincumbent airspace did not amount to trespass, but merely to nuisance, and that on the facts no nuisance existed because it was common ground that the presence of the sign in the superincumbent airspace did the plaintiff no harm. Fourthly, it was said that the appropriate remedy, if any was available to the plaintiff, was in damages and not by way of an injunction.

H. E. Francis for the defendants. The plaintiff never had demised to him the airspace above the shop. This lease was not a lease of a parcel of land with a shop erected thereon; if it had been, the airspace would clearly have been included. The habendum simply referred to "All that shop with the rooms and "cellars (if any) attached," and accordingly did not include the airspace above it. By the terms of the lease the plaintiff cannot make any use of the airspace above the shop: see subclauses (8) and (9) of clause 2.* If he cannot make any use of the airspace, he cannot reduce it into his possession.

Secondly, if the lease did operate to convey to the plaintiff the airspace above the shop, the demise was subject to all prior rights and easements granted by his landlords to any of the adjacent properties. On April 26, 1948, before the plaintiff entered into his first lease on December 25, 1948, his landlords gave permission to the owners of 409 for the erection of a sign to overhang the plaintiff's premises. This permission, so long as it remained unrevoked, gave those owners (and the defendants as claiming through them) a "right" in respect of the adjacent property, and the plaintiff's lease was subject to that right.

---

* Post, p. 340.

Thirdly, so long as the plaintiff's landlords did not withdraw their express consent to the erection of the sign, the plaintiff had no right to withdraw the implied consent which he must be deemed to have given, since he knew that the sign was going up and would be maintained by arrangement with the adjoining owners and made no objection at the time. He thereby led the defendants to believe that he consented to the maintenance of the sign in accordance with the arrangements made with the adjoining owners and is precluded from questioning the legality of the defendants' acts to their prejudice: see *In re William Porter & Co. Ltd.*[1]

Fourthly, the plaintiff's remedy is in nuisance and not in trespass. A mere invasion of superincumbent airspace amounts to a nuisance only: see *Pickering* v. *Rudd*[2] and *Clifton* v. *Viscount Bury*.[3] On the facts of the present case no nuisance existed, because it is agreed that the sign does not cause the plaintiff any damage or inconvenience.

Lastly, the appropriate remedy, if any, is in damages, and not by way of injunction: see Halsbury's Laws of England, 2nd ed., vol. 18, p. 21, and *per* A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.*[4]

Charles Lawson for the plaintiff. The lease of a shop includes the airspace above it: see *Martyr* v. *Lawrence*,[5] where the demise was "all that shop . . . situate . . . at . . ." The permission granted by the freeholders in January, 1950, for the erection of the sign could not affect the plaintiff's rights, since the freeholders had leased the airspace to the plaintiff and no longer had any right to grant permission as to its user. In any event the letters relied on as creating a right did not create a right in the adjacent property; at most it was a personal right in the defendants which did not fall within clause 1 of the lease. Further, the letters said only that no objection would be taken to the erection of the sign. The facts did not constitute an estoppel. The plaintiff made no representation and, indeed, as early as 1953 gave the defendants notice to revoke any licence which had been granted. [Reference was made to *Jorden* v. *Money*.[6]] The defendants, in seeking to rely on *In re William Porter & Co. Ltd.*,[7] are forced to suggest that they were putting up a sign under some agreement between the plaintiff and the owners of 409. There is no difference in law between an express and an implied licence. An express licence can be determined on reasonable notice (*Winter Garden Theatre (London) Ltd.* v. *Millenium Productions Ltd.*[8]), and there is no reason why a person said to have given an implied licence should be in any worse position.

---

[1] [1937] 2 All E.R. 361.

[2] (1815) 4 Camp. 219.

[3] (1887) 4 T.L.R. 8.

[4] [1895] 1 Ch. 287, 322, 323; 11 T.L.R. 137.

[5] (1864) 2 De G.J. & S. 261.

Reliance is placed on *Gifford* v. *Dent*,[9] supported by Winfield on Torts, 6th ed., pp. 378, 379, by *Wandsworth District Board of Works* v. *United Telephone Co. Ltd.*,[10] and by section 9 of the Air Navigation Act, 1920 (now replaced by section 40 (1) of the Civil Aviation Act, 1949), to dispose of the defendants' fourth point that the plaintiff's remedy is in nuisance and not in trespass. *Pickering* v. *Rudd* [11] and *Clifton* v. *Viscount Bury* [12] are doubtful decisions, and are in any case distinguishable.

The mere fact that the damage suffered is small is immaterial in considering whether damages should be awarded or an injunction granted: see Swinfen Eady J.'s judgment in *Marriott* v. *East Grinstead Gas and Water Co.*[13] in which he applied *Goodson* v. *Richardson*.[14] Even if the reason for applying for an injunction is unconnected with the land, that is immaterial in deciding what is the appropriate remedy. The remedies of self-help and abatement are always open to the plaintiff and the mere fact that damages have been awarded one day would not disentitle him from bringing another action the next day or using the remedy of self-help. Accordingly, the appropriate remedy in all the circumstances is an injunction.

McNair J. stated the facts and continued: The first question that I have to decide is: what rights, if any, in the airspace were conveyed to the plaintiff? It is common ground that, prima facie, the lease of land includes the lease of the airspace above, and it seems to me also, prima facie, that the lease of a single-storey ground floor premises would include the lease of the airspace above. That seems to be supported by *Martyr* v. *Lawrence*,[1] to which I have been referred by Mr. Lawson. It is said, however, on behalf of the defendants, that if the lease in question, namely, the lease of December, 1948, which it is agreed was replaced in 1955 by another lease in identical terms, is examined, it shows a contrary intention, that is, an intention merely to convey the shop and nothing more. The material clauses of the lease are as follows. Clause 1 contains the parcels and reads as follows: "All that shop with the rooms and cellars "(if any) attached situate and being in City Road and known "as numbers 407 and 407b City Road in the Borough of "Islington and County of London. Together with all rights "easements and appurtenances thereunto belonging subject "nevertheless to all rights and easements over the pavement "belonging to the lessors in front of the demised premises and to "all rights and easements to any of the adjacent property . . ." That is a description of the parcels. The lessee's covenants set out in clause 2 contain an obligation upon the lessee to keep the interior of the premises painted, whitewashed and cleansed, and contain a provision that the lessee shall not carry on or permit to be carried on on the said premises without the consent in writing of the lessors any trade or business other than that of a tobacconist. In subclauses (8) and (9) one finds the provisions which were relied upon by the defendants, namely: "(8) That the "lessee shall not nor will at any time place or exhibit outside "the said shop and premises or any part thereof any article for "sale or otherwise nor make use of the forecourt of the said shop "for any other purpose than that of access to the said shop and "premises. (9) That the lessee will not permit or suffer any "written printed painted or other notice sign or advertisement "whatsoever to be posted written or painted on or affixed to or "over any part of the exterior of the said shop and premises "(except on the shop front). And also shall not nor will alter "the construction or appearance of the said shop or any part "thereof." It is said that those two subclauses show an intention that the lessee shall not have any rights outside the shop and, in particular, shall have no rights in the airspace above the shop. In my judgment, however, those two subclauses really work the other way. In my judgment, they indicate that without those particular restrictions placed upon the lessee by subclauses (8) and (9) he would have unlimited rights of user in the airspace and the exterior parts of the shop. Seeing that he is only restricted by subclause (9) to not permitting or suffering advertisements to be fixed to or over any part of the exterior of the shop, it seems to me that that limitation necessarily implies that without that he has the full use of the airspace subject to that restriction. Similarly, as regards subclause (8), he is limited from exhibiting or depositing outside the shop any article for sale or otherwise, or making use of the forecourt, because it might be said, as indeed I think has been said in one of the cases to which I have been referred, that without such restriction the lessee is entitled to the full use, at any rate, of the space immediately above his forecourt and immediately above any basement which may be subject to the lease. Accordingly, I can find nothing in this lease which displaces the prima facie conclusion which one would otherwise reach that the airspace above the demised premises is part of the premises conveyed.

---

[6] (1854) 5 H.L.C. 185.

[7] [1937] 2 All E.R. 361.

[8] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.

[9] [1926] W.N. 336.

[10] (1884) 13 Q.B.D. 904.

[11] 4 Camp. 219.

[12] 4 T.L.R. 8.

[13] [1909] 1 Ch. 70, 79; 25 T.L.R. 59.

[14] (1874) L.R. 9 Ch. 221.

---

[1] (1864) 2 De G.J. & Sm. 261.

In support of the contrary argument Mr. Francis submitted that the plaintiff did not require the use of the airspace. That may well be so, but it does not seem to me to lead at all to the conclusion which was sought to be drawn from it, namely, that the airspace was not conveyed. At this stage I think it is relevant that I should refer to a decision of Romer J. in *Gifford* v. *Dent*,[2] and for the present purposes I refer only to his decision that the tenants of a shop on the ground floor of certain premises and of the basement which projected under the pavement had a right in the airspace superimposed upon that basement. Although the full terms of the lease in *Gifford's* case [2] are not stated, the judge does seem to have reached a conclusion which is in line with the conclusion which I have already reached in this case. I shall have to refer to *Gifford's* case [2] again in another connexion shortly where it is even more relevant.

The next point taken was this: that even if the airspace above the ground floor shop was conveyed by the lease, yet it was to be taken as subject to all rights and easements to any of the adjacent property, which as a matter of construction must be taken to mean all rights and easements belonging to the owners of and appertaining to the adjacent property; and it was said that, inasmuch as the lessors, the Improved Industrial Dwellings Co. Ltd., had granted a right to the owners of 409, being owners of the adjacent property, to permit the Imperial Tobacco Co. to

---

[2] [1926] W.N. 336.

1957

Kelsen
v.
Imperial
Tobacco Co.
(of Great
Britain and
Ireland)
Ltd.

McNair J.

put their sign out from the wall of 409, the plaintiff's rights in the airspace must be taken as subject to that right granted to the owners of the adjacent property. I think there are two answers at least to that point: first, that on the facts, as I have narrated them, the permission under which this sign was being put out was the permission granted in January, 1950, and not the permission granted in 1948. Accordingly, the landlord, having on my construction of the lease already parted to the plaintiff with all rights in the airspace, had no right to grant any permission to the adjacent owners or still less to the Imperial Tobacco Co. That is one answer. The second answer is that on the construction of the material documents, nothing in the nature of a real right in derogation of a possible lessee's rights was created by these letters. It is not suggested seriously that any easement was created, and it seems to me that it was a mere statement made to the owners of the adjacent property that the freeholders of the shop would take no objection to the freeholders of 409 granting permission to the Imperial Tobacco Co. to fix an advertisement. That does not seem to me to be a right of easement within the true construction of clause 1 of this lease.

The next point taken was that the plaintiff by his conduct in allowing the sign to remain in position from 1950 onwards was estopped thereafter, as I understood the argument, from ever objecting to that sign remaining there. The first point about that argument which seems to be strange is this, that if the Imperial Tobacco Co. had come direct to the plaintiff as the owner of the airspace above his shop and asked him expressly for his permission and he had granted his permission expressly, it is conceded, as I understood the argument before me, and rightly conceded, that such an express liberty given by the plaintiff would be revocable at least on reasonable notice unless by the express terms of the agreement or licence the plaintiff had debarred himself from terminating on reasonable notice. If that is the position with regard to express notice it is very difficult to see, however the case was put, that the position of the plaintiff can be worse if the permission relied upon is merely an implied permission, as indeed it must be, because there is no evidence or suggestion that he ever expressly granted permission. Nor do I think that any real case of estoppel, as I understand that doctrine, is made out on the facts of this case. There is no representation by the plaintiff of any existing fact which he now seeks to deny. The highest it can be put against the plaintiff is that by his conduct he must have conveyed to the defendants the impression or assurance that he would not object in the future. That seems to me to be exactly the kind of position which the House of Lords in *Jorden* v. *Money* [3] and similar cases have held not to constitute an estoppel. Nor can I see that the facts as proved give rise to any equitable estoppel, because I cannot see how in any way the Imperial Tobacco Co. were induced to act to their prejudice to such an extent as would entitle them, as they would be on their argument today, to a continuance of the exhibition of that sign for ever, or at any rate during the length of the plaintiff's lease. It may well be that they got good consideration for the expenditure which they incurred in putting up the sign by having it exhibited for the period of seven years during which it has been exhibited up to date. Furthermore, it must be borne in mind if any question of equitable estoppel is under consideration that, as I have already said, in 1953 the plaintiff did give clear notice to the defendants that he claimed a right to have this sign removed and that he would in fact exercise that right unless the defendants were more amenable to him as regards his quota. In fact they did become more amenable under that pressure and the quota was increased and they were allowed to maintain the sign in position. Accordingly, I reach the conclusion that nothing which has happened has deprived the plaintiff of the rights which he has in the airspace as conveyed to him by the lease.

That leads me to the next and in some ways most interesting point of the case, namely, whether an invasion of an airspace by a sign of this nature does give rise to an action in trespass or whether the rights, if any, of the owner of the airspace are not limited to complaining of nuisance; for if his rights are so limited it is clear on the facts of this case that no nuisance was created since the presence of this sign in the position where it was on this wall caused no inconvenience and no interference with the plaintiff's use of his airspace. This question of trespass by invasion of the airspace has been the subject of considerable controversy. One starts with the decision of Lord Ellenborough in *Pickering* v. *Rudd*,[4] where the trespass alleged was that the defendant had broken and entered the plaintiff's close by nailing on the defendant's own house a board which projected several inches from the wall and so far overhung the garden. Lord Ellenborough, in 1815, quite clearly said this [5]: "I do not think "it is a trespass to interfere with the column of air superincum-"bent on the close. I once had occasion to rule upon the circuit,

---

[3] (1854) 5 H.L.C. 185.

[4] (1815) 4 Camp. 219.

[5] 4 Camp. 220.

"that a man who, from the outside of a field, discharged a gun "into it, so as that the shot must have struck the soil, was guilty "of breaking and entering it. A very learned judge, who went "the circuit with me, at first doubted the decision, but I believe "he afterwards approved of it, and that it met with the general "concurrence of those to whom it was mentioned. But I am "by no means prepared to say, that firing across a field in vacuo, "no part of the contents touching it, amounts to a clausum "fregit. Nay, if this board overhanging the plaintiff's garden be "a trespass, it would follow that an aeronaut is liable to an "action of trespass quare clausum fregit, at the suit of the "occupier of every field over which his balloon passes in the "course of his voyage. Whether the action may be maintained "cannot depend upon the length of time for which the super-"incumbent air is invaded. If any damage arises from the object "which overhangs the close, the remedy is by an action on the "case."

Hawkins J. followed that decision and took the same view in *Clifton* v. *Viscount Bury*,[6] where he was dealing with the passage of bullets fired from a musketry range, the bullets passing some 75 feet above the surface of the land and not striking the land. He again held that that was not trespass, but, if anything, was nuisance.

There was an early doubt as to the correctness of Lord Ellenborough's statement expressed by Blackburn J. in *Kenyon* v. *Hart*[7]; it seems to me that since that date there has been a consistent line of authority to the contrary. For instance, in *Wandsworth District Board of Works* v. *United Telephone Co. Ltd.*[8] one of the questions at issue was whether a telephone line running across a street constituted a trespass as against the local authority in whom the street was vested. The main contest in the case was as to the extent of the vesting in the local authority, the conclusion being reached that they did not have vested in them the airspace above this street beyond what was necessary for its use as a street; but I think each of the Lords Justices in that case was quite clear in his conclusion that if the street and the airspace above it had been vested in the local authority the passage of a telephone line through that airspace would have constituted a trespass and not a mere nuisance. I need not elaborate my judgment by citing the passages from the three judgments.

---

[6] (1887) 4 T.L.R. 8.

[7] (1865) 6 B. & S. 249, 252.

[8] (1884) 13 Q.B.D. 904.

In the case to which I have already referred, namely, the decision of Romer J. in *Gifford* v. *Dent*,[9] the judge quite clearly took the view that a sign which was erected on the wall above the ground floor premises which had been demised to the plaintiff and projected some 4 feet 8 inches from the wall did constitute a trespass over the plaintiff's airspace, that airspace being the column of air above the basement which projected out into the pavement. The report of *Gifford's* case reads[10]: "If he"—that is, the judge—"was right in the conclusion to which he had "come that the plaintiffs were tenants of the forecourt and were "accordingly tenants of the space above the forecourt usque ad "coelum, it seemed to him that the projection was clearly a "trespass upon the property of the plaintiffs." That decision, I think, has been recognized by the textbook writers, and in particular by the late Professor Winfield, as stating the true law. It is not without significance that the legislature in the Air Navigation Act, 1920, section 9 (replaced by section 40 (1) of the Civil Aviation Act, 1949), found it necessary expressly to negative the action of trespass or nuisance arising from the mere fact of an aeroplane passing through the air above the land. It seems to me clearly to indicate that the legislature at least were not taking the same view of the matter as Lord Ellenborough in *Pickering* v. *Rudd*,[11] but rather taking the view accepted in the later cases, such as the *Wandsworth District* case,[12] subsequently followed by Romer J. in *Gifford* v. *Dent*.[13] Accordingly, I reach the conclusion that a trespass and not a mere nuisance was created by the invasion of the plaintiff's airspace by this sign.

There remains for my consideration the final point urged by counsel for the defendants, that the proper remedy here is a remedy in damages and not by way of injunction. In that connexion I was referred to a classic statement by A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.*,[14] where he stated the principles to be applied in deciding whether an injunction should be granted or damages awarded as follows: "Many judges have stated, and I emphatically agree "with them, that a person by committing a wrongful act (whether "it be a public company for public purposes or a private "individual) is not thereby entitled to ask the court to sanction "his doing so by purchasing his neighbour's rights, by assessing

---

[9] [1926] W.N. 336.
[10] Ibid.
[11] 4 Camp. 219.
[12] 13 Q.B.D. 904.
[13] [1926] W.N. 336.
[14] [1895] 1 Ch. 287, 322; 11 T.L.R. 137.

"damages in that behalf, leaving his neighbour with the nuisance, "or his lights dimmed, as the case may be. In such cases the "well-known rule is not to accede to the application, but to grant "the injunction sought, for the plaintiff's legal right has been "invaded, and he is prima facie entitled to an injunction. There "are, however, cases in which this rule may be relaxed, and in "which damages may be awarded in substitution for an injunc"tion authorized by this section. In any instance in which a "case for an injunction has been made out, if the plaintiff by "his acts or laches has disentitled himself to an injunction the "court may award damages in its place." Here I do not find that there has been any such disentitlement by reason of the acts or laches of the plaintiff. The Lord Justice continued[15]: "So again, whether the case be for a mandatory injunction or "to restrain a continuing nuisance, the appropriate remedy may "be damages in lieu of an injunction, assuming a case for an "injunction to be made out. In my opinion, it may be stated "as a good working rule that—(1) If the injury to the plaintiff's "legal rights is small, (2) And is one which is capable of being "estimated in money, (3) And is one which can be adequately "compensated by a small money payment, (4) And the case is "one in which it would be oppressive to the defendant to grant "an injunction:—then damages in substitution for an injunction "may be given. There may also be cases in which, though the "four above-mentioned requirements exist, the defendant by his "conduct, as, for instance, hurrying up his buildings so as if "possible to avoid an injunction, or otherwise acting with a "reckless disregard to the plaintiff's rights, has disentitled him"self from asking that damages may be assessed in substitution "for an injunction."

I have no doubt at all that I have a discretion here which I have to exercise judicially to award damages in lieu of an injunction if I see fit. It is true that the injury to the plaintiff's legal rights in this case is small. It has already been stated that this sign in his airspace does him no harm and does not diminish his enjoyment. I doubt whether it is a case in which one can estimate the damage in terms of money, because the damages really, if estimated at all, would have to be stated to be nominal. But I cannot find that it would be in any way oppressive to the defendants to grant an injunction. It is true that considerable expense, stated to be some £220, was incurred some seven years ago in erecting this sign, but I have no evidence at all as to whether the defendant company have not had good value for that expenditure. I do know that another cigarette manufacturing company are apparently prepared to pay the plaintiff £75 a year for a smaller advertisement in a less prominent position. Furthermore, I think it is relevant here that the defendants throughout the case have been insisting upon the right to display this advertisement as a matter of right. I think that is a circumstance which the court is entitled to take into account in determining whether a small money payment with a declaration of right should be sufficient or whether an injunction should be granted. Cases in which an injunction has not been granted on the ground of hardship have, I believe, been mostly cases in which there has been some accidental invasion of the plaintiff's rights. I was referred by Mr. Lawson to *Goodson* v. *Richardson*,[16] where a strong Court of Appeal certainly held that the mere fact that the invasion of the highway in that case did not cause any serious damage to the owner of the highway did not disentitle him from an injunction. I am further impressed by this fact, that if I refuse to grant an injunction in this case there is nothing to prevent the defendant company from continuing to display this sign and leave it to the plaintiff again to put forward a subsequent claim for damages in a further action. If I were to decide that an appropriate remedy would be a small money payment of nominal damages, I would be, in effect, saying that although such implied licence, if any, as the defendants have has been determined, nevertheless the defendants are entitled to continue to display their sign.

---

[15] [1895] 1 Ch. 287, 322, 323.

In my judgment, bearing in mind that both parties have in pursuance of what they claimed to be their business interests attempted to bring commercial pressure to bear one upon the other, this is a proper case in which the court should direct that there should be a mandatory injunction that this sign be removed forthwith.

Judgment for the plaintiff.

Solicitors: *Jaques & Co.; Trower, Still & Keeling for William Sommerville, Bristol.*

C. J. E.

---

[16] (1874) L.R. 9 Ch. 221.

[MANCHESTER WINTER ASSIZES.]

1957
Mar. 14.

Streatfeild J.

HUDSON *v.* RIDGE MANUFACTURING CO. LTD.

[1955 H. No. 5284.]

Negligence—Safe system of work—Dangerous employee—Injury caused to fellow workman—Failure by employer to prevent habitual horse-play of one workman known to be likely to injure other servants.

For nearly four years one of the defendants' employees had made a nuisance of himself to his fellow employees, including the plaintiff, a cripple, by persistently engaging in skylarking, such as tripping them up. Many times he had been reprimanded by the foreman and warned that he would hurt someone, but without effect. No further steps were taken to check this conduct by dismissal or otherwise. On March 26, 1954, this employee, indulging in horse-play, tripped up the plaintiff and injured him. In a claim by the plaintiff against the defendants for damages on the ground that they had failed to maintain such discipline among their employees as would protect him from dangerous horse-play:—

Held, that as this potentially dangerous misbehaviour had been known to the employers for a long time, and as they had failed to prevent it or remove the source of it, they were liable to the plaintiff for failing to take proper care of his safety.

Smith v. *Crossley Brothers Ltd.* (1951) 95 S.J. 655 distinguished.

ACTION.

The plaintiff claimed damages from the defendants for injuries received when he was tripped up by a fellow servant as a practical joke.

The facts are fully set out in the judgment.

C. T. B. Leigh for the plaintiff. An employer's four duties —to provide safe plant and machinery, safe premises, competent fellow servants and a safe system of work—are only branches of the personal duty of the employer to take reasonable care for the safety of his servants. A workman addicted to dangerous horse-play is just as dangerous to a fellow servant as an incompetent workman. To take an extreme example, if the captain of a ship when in drink rapes a passenger, the owners of the vessel will not be liable to the passenger, but if the captain, to the knowledge of his employers, had seven convictions for indecent assault, and he rapes the stewardess, it is submitted that the employers will

---

[Reported by JOHN WARD, Esq., Barrister-at-Law.]

1957

HUDSON
v.
RIDGE
MANUFACTURING
CO. LTD.

be liable to her. The facts of this case are the converse of those in *Smith* v. *Crossley Brothers Ltd.*[1] and the principle of *Smith's* case is applicable. Here there was repeated misconduct and inadequate steps were taken by the employers to prevent it. The employers should have dismissed Chadwick before this accident happened.

W. D. T. Hodgson for the defendants. It is conceded, on the authority of *Smith* v. *Ocean Steamship Co. Ltd.*,[2] that if an employer has reason to anticipate misconduct by an employee dangerous to other employees, the employer would be under a duty to the other employees to take reasonable steps to prevent harm arising from it, and that, if reprimands are disregarded, the duty ultimately involves dismissal of the vicious or mischievous servant. But since Chadwick was not vicious it was a question of degree whether the time had arrived at which the employers bore a duty to Chadwick's fellow servants to dismiss him, and it is submitted that on the facts that time had not come. Consequently the defendants have fulfilled their whole duty to the plaintiff.

STREATFEILD J. This is an unusual form of action and I confess that, at the first approach, it struck me that the plaintiff might be in some difficulty, but having heard the evidence in the case I think the position is tolerably clear.

The plaintiff was injured, in the course of his work, on March 26, 1954, through a foolish prank practised upon him by one Harold Chadwick, a fellow servant who is not over-intelligent and appears to have grown to manhood with childish pranks still part of his make-up. Apparently over the course of some years, while he was employed by the defendants, he had repeatedly made a nuisance of himself, to say the least of it, to his fellow employees through his almost incurable habit of tripping people up, or otherwise engaging in horse-play and skylarking; the kind of thing which was not intended to do any injury, and which certainly could not be regarded as bullying. No doubt it was regarded as a bit of fun and almost harmless, but it was the kind of thing that is bound, one of these days, as the witnesses say, to lead to some injury.

That had been going on for some years and, notwithstanding repeated reprimands, Chadwick continued in his practice of teasing, not only the plaintiff, but other people with this kind of conduct, and on this particular occasion the inevitable at last happened. In the course of Chadwick's getting hold of the plaintiff from behind, as the plaintiff says, and then forcing him down onto the ground, the plaintiff put his hand out to save himself and fractured his right wrist. I accept the plaintiff's evidence as to how this accident happened.

---

[1] (1951) 95 S.J. 655.

[2] [1954] 2 Lloyd's Rep. 482.

Having been injured in that way during his work, the question arises whether the employers are responsible. As Mr. Leigh put it in his opening, he does not contend that the employers are vicariously liable for any negligent act of a fellow servant, but that they are primarily liable because they were guilty of a breach of their common law duty to take care for the safety of their employees.

This is an unusual case, because the particular form of lack of care by the employers alleged is that they failed to maintain discipline and to take proper steps to put an end to this skylarking which might lead to injury at some time in the future. As it seems to me, the matter is covered not by authority so much as principle. It is the duty of employers, for the safety of their employees, to have reasonably safe plant and machinery. It is their duty to have premises which are similarly reasonably safe. It is their duty to have a reasonably safe system of work. It is their duty to employ reasonably competent fellow workmen. All of those duties exist at common law for the safety of the workmen, and if, for instance, it is found that a piece of plant or part of the premises is not reasonably safe, it is the duty of the employers to cure it, to make it safe and to remove that source of danger. In the same way, if the system of working is found, in practice, to be beset with dangers, it is the duty of the employers to evolve a reasonably safe system of working so as to obviate those dangers, and upon principle it seems to me that if, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger.

I agree with Mr. Hodgson, for the defendants, that it is a matter of degree. Nobody would say that if Chadwick had merely tripped somebody up for the first time and had been at once reprimanded by the foreman and then did not do it again, that was such conduct, on an isolated occasion by a man, as would put upon the employers the duty of taking the extreme course of dismissing that workman in case he should do it again. Most people, if they are told not to do a thing, will carry out that instruction. In the same way, nobody would say that employers, after one or perhaps two experiences of that kind, would foresee that danger was likely to result from that particular sort of conduct. I think I am fortified in that view by the case, to which Mr. Leigh drew my attention, of *Smith* v. *Crossley Brothers Ltd.*,[1] in which Pearce J., in the first instance, had found the employers liable because injury had been caused to the plaintiff, a boy of 16 years of age, through the conduct of two apprentices in the misuse of a compressed air pipe, which they put up this unfortunate plaintiff's rectum. It was found that the employers were liable, but Singleton L.J., in allowing the appeal and finding the employers not liable, said [2]: "The defendants had no reason "whatever to anticipate that the two apprentices in question "would use it in that way." They had never done it before. "The duty of an employer towards his employees was to take "reasonable care for their safety; and the evidence did not show "any negligence by the defendants. The injury to the plaintiff "resulted from what was wilful misbehaviour by the other two "boys and a wicked act which the defendants had no reason to "foresee." In that case the injury was due to something which had never happened before. It is clear, on the facts of the case, that there was no danger from this compressed air pipe which the employers could anticipate would result; but in the present case the evidence is all one way and it makes, in my judgment, this case the converse of *Smith* v. *Crossley Brothers Ltd.*,[3] because here the evidence is that over a space of something like four years Chadwick had been in the habit of doing this kind of thing to his fellow employees, including the plaintiff, over and over again. He was reprimanded frequently by the foreman and told that if he did not stop this horse-play, somebody was likely to be hurt.

Here is a case where there existed, as it were in the system of work, a source of danger, through the conduct of one of the defendants' employees, of which they knew, repeated conduct which went on over a long period of time, and which they did nothing whatever to remove, except to reprimand and go on reprimanding to no effect. In my judgment, therefore, the injury was sustained as a result of the defendants' failure to take proper steps to put an end to that conduct, to see that it would not happen again and, if it did happen again, to remove the source of it. It was for that reason that this injury

---

[1] (1951) 95 S.J. 655.

[2] Ibid.

[3] Ibid.

1957

HUDSON v. RIDGE MANUFACTURING CO. LTD.

resulted. Under those circumstances, although it is an unusual type of case, I have come to the conclusion that Mr. Leigh is right in his contention and that the defendants are liable for the plaintiff's injuries.

Judgment for the plaintiff for £720 6s. 3d.

Solicitors: *F. Edwin Monks & Co., Manchester; James Chapman & Co., Manchester.*

C. A.

1957
May 9, 10.

Hodson, Parker and Ormerod L.JJ.

TRIEFUS & CO. LTD. *v.* POST OFFICE.

[1954 T. No. 732.]

Crown Proceedings — Post Office — Liability in contract — Registered overseas postal packets—Theft by postal servant—Whether claim in contract maintainable—Post Office Act, 1908 (8 *Edw.* 7, *c.* 48), *ss.* 12, 13—*Crown Proceedings Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 44), *s.* 9 (1) (2)—*British Commonwealth and Foreign Post Warrant,* 1948 (*S.I.* 1948, *No.* 590), *reg.* 61.

Judicial Precedent—Decision long undisturbed—Weight—Liability of Post Office in contract.

The Post Office is a branch of revenue and the Postmaster-General does not enter into any contract with a person who entrusts to the Post Office a postal packet for transmission overseas.

A company handed two postal packets to the Post Office for registration and transmission overseas, receiving for each a certificate of posting in common form, on which was printed an extract from the Post Office Guide, stating, inter alia, that compensation for loss or damage was limited to £2 18s. 0d. The packets were stolen by a servant of the Post Office while in transit. The company brought an action to recover damages, alleging, inter alia, breach of contract. On a preliminary question of law whether there was any contract as alleged:—

Held, that there was no contract between the Post Office and the company. The possibility of any contractual tie, express or implied, was excluded by the terms of the relevant statutory enactments, and in particular by section 13 of the Post Office Act, 1908,[1] and regulation 61 of the British Commonwealth and Foreign Post Warrant, 1948. If no contract otherwise existed, the terms of the Post Office Guide could not create such a contract.

Dictum of Lord Birkenhead L.C. in *Bourne* v. *Keane* [1919] A.C. 815, 857; 35 T.L.R. 560 applied.

Dicta of Gould J. in *Lane* v. *Cotton* (1701) 1 Ld.Raym. 646, 648, and of Lord Mansfield in *Whitfield* v. *Lord Lé Despencer* (1778) 2 Cowp. 754, 764–766 approved.

Decision of Gorman J. affirmed.

APPEAL from Gorman J. on a preliminary point of law.

The plaintiff company, Triefus & Co. Ltd., diamond merchants, claimed damages from the Post Office for breaches of statutory duty, breaches of contracts of carriage and of bailment, negligence and negligent system of working from about November, 1952, to June, 1953, in the London postal area. They claimed that on April 29 and on June 22, 1953, they had handed to the Post Office at Hatton Garden two postal packets containing diamonds valued at £3,380 and £17,998 respectively, for carriage and transmission to New Zealand, the packets being properly packed, secured, registered, declared, and in all respects in accordance with the appropriate Post Office regulations, all proper dues, charges and duties thereon being paid; that the Post Office had accepted the packets and thereby entered into contracts of carriage, or alternatively of bailment, with the company, the terms of which included, inter alia, that they would act reasonably in connexion with the carriage and transmission, use care and diligence, employ only adequate post officers, carry and transmit the packets by an efficient and appropriate system, and not lose the packets. They alleged that the Post Office were in breach of each of those terms, whereby the packets had been mislaid or stolen, and that they had thereby suffered loss or damage. Alternatively, they claimed that the Post Office had been negligent.

By their defence the Post Office admitted receiving the packets, but denied that there had been any contract or any contracting intention by the company's handing in the packets and the Post Office receiving them. They claimed that they had received the packets under or in pursuance of section 12 of the Post Office Act, 1908,[1] and regulations made thereunder (The British Commonwealth and Foreign Post Warrant, 1948 (S.I. 1948, No. 590)), and relied on regulation 61, which provides: "... nothing contained in or done under or in pursuance of "this warrant shall render [the Postmaster-General] liable either "personally or in his official capacity, to any action or other legal "proceeding in respect of or in consequence of any such loss or "damage [of registered postal packets ...]." They also relied on section 13 of the Act of 1908.[1] The Post Office claimed, further, that on receiving each of the postal packets in question they had delivered to the plaintiffs and the plaintiffs had received a certificate of posting in common form on which were printed, inter alia, the following words: "Overseas":—". . . Registration "in the international service is not a system of insurance. Compensation is not paid for loss or damage of contents as distinct "from loss of the entire packet, and the payment made in no "circumstances exceeds £2 18s. Packets sent to many countries "abroad can be insured against loss or damage of contents (see "Post Office Guide)."; and that on pages 91 and 92 of the current Post Office Guide there were like notices in more ample form.

The defence claimed, further, that if the plaintiffs made with them any of the contracts alleged, all the provisions in the certificate of posting and the Post Office Guide referred to above formed terms of any such contract. They admitted that the postal packets were stolen. On the plaintiffs' allegations of negligence the Post Office claimed that that constituted an allegation of tort against the Crown or a person or persons employed as a servant of the Crown within the meaning and scope of section 9 (1) of the Crown Proceedings Act, 1947,[2] on which the Post Office relied.

---

[1] Post Office Act, 1908, s. 12: "All postal packets shall be posted, "forwarded, conveyed, and delivered "subject to such provisions, conditions, prohibitions, and restrictions "respecting the time and mode of "posting and delivery, and of the "payment of postage and other sums "in respect thereof chargeable under "this Act or any warrant or regulations made under this Act, and "respecting the registration of, and "giving receipts for, and giving and "obtaining certificates of posting and "delivery of, any postal packet, and "the sums to be paid in addition to "any other postage for that registration, receipt, or certificate, and "respecting stamps, covers, form, "dimensions, maximum weight, inclosures, the use of packets (other "than letters) for making communications, and otherwise, as may be "directed by Post Office regulations."
S. 13: "The registration of or "giving a receipt for a postal packet, "or the giving or obtaining of a "certificate of posting or delivery of "a postal packet, shall not render "the Postmaster-General or the Post "Office revenue in any manner liable "for the loss of the packet or the "contents thereof."

[2] Crown Proceedings Act, 1947, s. 9: "(1) Subject as hereinafter provided, no proceedings in tort shall "lie against the Crown for anything "done or omitted to be done in relation to a postal packet by any "person while employed as a servant "or agent of the Crown, or for anything done or omitted to be done in "relation to a telephonic communication by any person while so "employed; nor shall any officer of "the Crown be subject, except at the "suit of the Crown, to any civil "liability for any of the matters "aforesaid. (2) Notwithstanding the "provisions of section thirteen of the "Post Office Act, 1908, proceedings "shall lie against the Crown under "this subsection in respect of loss of "or damage to a registered inland

When the action came on for hearing before Gorman J. on October 2, 1956, counsel for the plaintiff company stated that certain admissions had been made by the Post Office. It had been agreed between the parties that those admissions should be read to the court as constituting the case for the plaintiff and that the judge should then be asked to try as a preliminary point of law on the admitted facts the question whether there was a contract as alleged by the plaintiffs. The admitted facts included the following: that the two postal packets had been received by the Post Office, and had been handled on their behalf by one Eagle, who stole them and other registered packets between November, 1952, and June, 1953; that Eagle had been suspected of dishonesty in his employment by the Post Office before April 29, 1953; that Eagle was first employed by the Post Office in 1930 as a messenger boy, personal references being taken up before he was so employed; and that Post Office servants were not subjected to physical search at any time.

On those admissions counsel for the plaintiffs conceded that their claims in tort were excluded by the provisions of section 9 (1) of the Crown Proceedings Act, 1947. On the preliminary point, namely, that there was a contract, he referred the judge to *Lane* v. *Cotton*[3] and *Whitfield* v. *Lord Lé Despencer*[4] and, in particular, the judgment of Lord Mansfield[5] in the latter case, and conceded that the matter must be determined against the plaintiffs in the Court of Queen's Bench since those authorities were binding on the judge; that the plaintiffs' case must accordingly be dismissed; and that the preliminary point must be taken to the Court of Appeal. Gorman J. gave judgment accordingly.

The plaintiffs appealed.

Sir Frank Soskice Q.C. and *Anthony Cripps* for the plaintiff company. The sole question on appeal is whether in law a contract exists between the Post Office and a person who hands to the Post Office a registered postal packet for transmission overseas, pays the registration fee and postage thereon, and receives a certificate of posting which refers to the Post Office

---

"postal packet, not being a telegram, "in so far as the loss or damage is "due to any wrongful act done or "any neglect or default committed by "a person employed as a servant or "agent of the Crown while perform-"ing or purporting to perform his "functions as such in relation to the "receipt, carriage, delivery or other "dealing with the packet: Provided "that: . . ."

[3] (1701) 1 Ld.Raym. 646, 648.

[4] (1778) 2 Cowp. 754.

[5] Ibid. 764–766.

Guide. A has rendered a service to B in exchange for payment, and on the evidence all the elements are present which bring into being what is prima facie a contractual obligation. The language of the documents is the language of contract, as is much of the language of the Post Office Act, 1908, and the Warrant of 1948. The statement on p. 74 of the Guide that "the Post Office enters "into no contract of carriage" means only that the contract is not one within the Carriers Act, 1830.

Though the dicta of Gould J. in *Lane* v. *Cotton*[6] and of Lord Mansfield in *Whitfield* v. *Lord Lé Despencer*[7] (to the effect that the Postmaster-General never enters into contracts) are authorities which appear to exclude the possibility of a contract as here alleged, they were obiter only, since the actions were in case and not in contract; they decided only that the Postmaster-General was not liable for the wrongful acts of his subordinates, since he and they were both servants of the Crown. That was also the ratio in *Bainbridge* v. *Postmaster-General*.[8] [*Roper* v. *Public Works Commissioners*[9] and *Frampton* v. *Gillison*[10] were also referred to.]

Even if those dicta set out the law as it was in the eighteenth century, they related to a situation of fact and legislation which have so radically altered since that they are no longer applicable as a statement of the law today and should be overruled. It cannot now be said that the Postmaster-General does not enter into contracts, for he has had power conferred on him by Acts of Parliament to do so and does in fact enter into many contracts, as do other public authorities and persons. [*Graham* v. *Public Works Commissioners*[11] was referred to.]

[ORMEROD L.J. It is difficult to consider whether there is a contract without knowing its terms.]

The court can say that there is in law a contractual nexus without adumbrating the terms of that contract. But the most likely incident of such a contract would be that the Post Office will be careful in its custody of the packet and will maintain a safe and efficient system and not allow thieves to steal it. Another likely incident would be an undertaking by the Post Office to deliver the packet "according to instructions"; but it is conceded that the company here cannot claim for failure to deliver according to instructions because of the principle established by *Clegg*,

---

[6] 1 Ld.Raym. 646, 648.

[7] 2 Cowp. 754, 764–766.

[8] [1906] 1 K.B. 178; 22 T.L.R. 70.

[9] [1915] 1 K.B. 45.

[10] [1927] 1 Ch. 196; 42 T.L.R. 749.

[11] [1901] 2 K.B. 781; 17 T.L.R. 540.

Parkinson & Co. v. *Earby Gas Co.*[12] that a member of the public cannot sue a public authority for not doing what an Act of Parliament tells it to do—in that case a gas company for not supplying gas. That was followed in *Read* v. *Croydon Corporation.*[13]

[PARKER L.J. In *Read's* case [13] Stable J. said that a relationship forced on to people by the water-supplying authority was not contractual.]

Neither *Read's* case [13] nor *Clegg's* case [14] precludes an action in contract where, as here, the company can show that by reason of a separate and special failure of the Post Office to maintain an efficient system they have suffered a special loss. That is a contractual obligation wholly different in kind from that of delivering " according to instructions."

[PARKER L.J. Is it not the result of the cases that the obligation of the Postmaster-General is to Parliament, to provide an efficient service for the public, and that no individual member of the public can sue on that obligation?]

Countess Rothes v. *Kirkcaldy Waterworks Commissioners* [15] shows that a contractual obligation can arise out of statute; while in *Glasbrook Brothers Ltd.* v. *Glamorgan County Council* [16] the House of Lords held that there could be a charge for a purely public service—the police—and a contract for special protection. It supports the submission that there is nothing repugnant to the policy of the law in the conception of a contract for payment for rendering a purely public service.

The liability of the Postmaster-General is in respect of all letters, whether registered or not. Though section 9 of the Crown Proceedings Act, 1947, precludes the company from proceeding in tort, it does not affect the claim in contract.

Section 13 of the Post Office Act, 1908, is no obstacle to the existence of a contract. The words " shall not render . . . in " any manner liable . . ." do no more than provide that the mere fact of registration shall not of itself create an obligation in the Postmaster-General which he would not otherwise be under. The words " in any manner " are mere words of emphasis. Section 13 has in any event been modified by section 9 (2) of the Crown Proceedings Act, 1947, which allows claims in contract for loss of an inland registered packet. Regulation 61 of the Warrant of 1948 is similarly no obstacle, for it relates only to something

---

[12] [1896] 1 Q.B. 592; 12 T.L.R. 241.

[13] (1938) 55 T.L.R. 212; [1938] 4 All E.R. 631.

[14] [1896] 1 Q.B. 592.

[15] (1882) 7 App.Cas. 694.

[16] [1925] A.C. 270; 41 T.L.R. 213.

"done under" the regulations, and the keeping of a negligent system is not something "done under" the regulations but wholly outside them.

A. Melford Stevenson Q.C., *Patrick O'Connor* and *Richard Brew* for the Post Office. There is no contract here. The admitted facts both in the pleadings and the notice to admit facts do not support an inference that a contract was made. One of the ingredients of contract must be an intention common to both parties, but it is quite plain from the language of regulation 61 and the language in the Act in which postage is levied that there was no intention on the part of the Postmaster-General to make any contract; on the contrary, he has a discretion to deal with any claim for loss or damage which may arise.

Equally conclusive against the inference of contract is the language of sections 1 and 2 of the Act of 1908, which make plain that postage is a duty exacted for the revenue and not money paid pursuant to any contractual obligation: see the provision in section 2 (2) that if a letter is posted without a stamp, the addressee must pay the surcharge before taking it in. That is not an incident of contractual relationship.

Further, section 34 of the Act of 1908—reproduced in the Act of 1953—shows that the Postmaster-General is not under any duty to receive and transmit mails but is given an exclusive privilege, a monopoly, to do so. *Read* v. *Croydon Corporation* [17] and *Clegg, Parkinson & Co.* v. *Earby Gas Co.*[18] are accordingly irrelevant, for they are cases where a statutory duty was imposed on a particular body to do a particular thing.

[HODSON L.J. I think that the Postmaster-General is under a duty; the Act imposes the duty in a very dignified way by calling it a privilege.]

Section 13 of the Act of 1908 is in any event a complete answer for the Post Office, for it states conclusively that the Postmaster-General is not "in any manner liable" for the loss of a registered packet or its contents. The purpose of that section (which purpose has succeeded for nearly half a century) was to make plain to anyone who entertained the ideas put forward for this appellant that he could not succeed. The fact that section 9 (2) of the Crown Proceedings Act, 1947, has driven a small hole in section 13 in relation to inland registered packets does not affect its application to overseas registered packets.

---

[17] 55 T.L.R. 212.

[18] [1896] 1 Q.B. 592.

In any event the Act by sections 56 and 57 provides safeguards for the public against Post Office servants who are guilty of misconduct.

[PARKER L.J. That is what appealed to Lord Mansfield in 1778—that an individual member of the public does not have a contract but has safeguards of another kind.]

The language of the Post Office Act, 1953, is in conformity with Lord Mansfield's dicta, which in turn are in conformity with p. 74 of the Post Office Guide. Those dicta have stood a long time and are applicable today.

Sir Frank Soskice Q.C. in reply. It does not assist the argument for the Post Office that sums paid for postage are described as a duty and part of the revenue of the Crown, for that is true of almost every receipt by a Government Department. Ministers who have power to contract as principals receive payment as part of the public revenue, but their relationship is nevertheless contractual.

If the true view of the Postmaster-General's position today is that he is a public servant with an exclusive monopoly in the provision of post offices and services and a discretion to provide them, it is easier to spell out a contract from the transaction between an ordinary member of the public and the public officer vested with that privilege and discretion. The person who goes to the Post Office expects to receive service for which he pays and is in the same position as a person who rides on an omnibus or a railway train in a nationalized transport service.

Sections 56 and 57 do not provide safeguards for the public against theft, for "other misconduct" does not include theft. The subject who has suffered special loss has no remedy other than the safeguard available to everyone else—criminal prosecution. The private individual has no special protection against what has happened here. The fine which can be imposed is only £20, and that is not a very strong sanction.

HODSON L.J. stated the facts set out above, referred to the pleading in contract, and continued: When the matter came before the judge, counsel then appearing for the plaintiffs took the course that on the agreed facts he was prepared to accept the position that, on a submission of no case by the defendant, he could not succeed in law, having regard to some old decisions of the Court of King's Bench which were binding on Gorman J. He thereupon, without argument, allowed the matter to be determined against him and the action dismissed. In this court those decisions, which have stood for a long time, are no doubt open to review—one a decision of 1701 and the other of 1778. The well-recognized practice on this matter was discussed by the House of Lords in *Bourne* v. *Keane*,[1] where the authorities on the non-disturbance of decisions of long standing were reviewed, and it was said by Lord Birkenhead L.C.[2]: "If there were, in "fact, an unbroken line of authorities dating back 300 years, "then it would have been a matter for grave discussion whether "this House, in accordance with well-recognized principles, would "consent to break that chain."

The two authorities have stood for a very long time, and no one has hitherto, until now, made any attempt to allege that in circumstances such as these a contract could be said to exist between the Post Office and the person who entrusts to the care of the Post Office a letter or package.

In this court, Sir Frank Soskice, on behalf of the plaintiffs, has taken a point which I think was not taken below, namely, that the authorities, although they contain language which is adverse to this claim, are not in any event valid, because the judges, in expressing their views about the contractual aspect of this matter, were doing so merely obiter, since in each of the decisions the claim was framed in case and therefore the question of contract did not directly arise for decision. We have listened to the argument on that basis, and, for my part, I think that it is correct that the observations on contract were obiter and not directed to the matters raised on the pleadings. Nevertheless, the law as laid down in those cases (in the second case very clearly by that great judge Lord Mansfield) has been accepted from 1778 till now, and the statutes which he had to consider were in pari materia with the Post Office Acts in force today. That in force today is the Post Office Act, 1953; that which was in force at the relevant date so far as these proceedings are concerned is the Post Office Act, 1908. In my judgment, what Lord Mansfield said in 1778 is appropriate today and is entitled to the highest possible respect.

The first case, *Lane* v. *Cotton*,[3] a decision of the Court of King's Bench, followed on the first Post Office Act of 1660, which recited the existence of post offices, established the office of Postmaster-General, and fixed the rates for carrying letters. On that statute the position was considered by Holt C.J. and Turton, Powys and Gould JJ. The three judges, other than the

---

[1] [1919] A.C. 815; 35 T.L.R. 560.

[2] [1919] A.C. 815, 857.

[3] (1701) 1 Ld.Raym. 646.

Chief Justice, were of opinion—although the matter was not raised on the pleadings—that there was no contract. The Lord Chief Justice was a dissenting judge. I will read only an extract from the judgment of Gould J.[4]: "If any thing can support "this action, it must be a contract expressed or implied; but "here is neither the one nor the other."

The next matter to which I need refer is the subsequent statute which was passed in the reign of Queen Anne, in 1710, dealing with the larger duties of the Post Office which existed at that time, and increased the rates payable. I should say in passing that it is clear from the language of those old statutes that the Postmaster-General had a monopoly in the carriage of letters and packages for the Crown. I think it is also clear that he was in a position to enter into contracts; he had a monopoly, for example, of providing horses, which would involve entering into contracts with persons who had horses for hire.

The second case, which contains the important judgment of Lord Mansfield, is *Whitfield* v. *Lord Lé Despencer*.[5] The matter was argued twice, and though it is not plain from the report who were the other judges who sat with Lord Mansfield, they were clearly of the same opinion as Lord Mansfield. This action was on the case, and the headnote reads: "Case does not lie against "the Post-master general, for a bank-note stolen by one of the "sorters out of a letter delivered into the Post-office." In the course of his judgment, Lord Mansfield referred to *Lane* v. *Cotton*,[6] and in particular to the dissenting judgment of Holt L.C.J. He said[7]: "The ground of Holt L.C.J.'s opinion in "that case, is founded upon comparing the situation of the Post-"master to that of a common carrier, or the master of a ship "taking goods on board for freight. Now, with all deference to "so great an opinion, the comparison between a Post-master and "a carrier, or the master of a ship, seems to me to hold in no "particular whatsoever. The Post-master has no hire, enters "into no contract, carries on no merchandize or commerce. But "the Post-office is a branch of revenue, and a branch of police, "created by Act of Parliament. As a branch of revenue, there "are great receipts; but there is likewise a great surplus of "benefit and advantage to the public, arising from the fund. "As a branch of police, it puts the whole correspondence of the "kingdom (for the exceptions are very trifling) under govern-"ment, and entrusts the management and direction of it to the

---

[4] 1 Ld.Raym. 646, 648.

[5] (1778) 2 Cowp. 754.

[6] 1 Ld.Raym. 646.

[7] 2 Cowp. 754, 764–765.

"Crown, and officers appointed by the Crown. There is no "analogy therefore between the case of the Post-master and a "common carrier. The branch of revenue and the branch of "police are to be governed by different officers. The superior "has the appointment of the inferior officers; but they give "security to the Crown. One requisite is, that they shall take "the oaths taken by all public officers: another strong guard "is, that they are made subject to heavy penalties; and this is "carried so far, that, what in the case of a common carrier, or "any other person, would be only a breach of trust, is in them "declared to be a capital felony." At the end of his judgment he referred to the position as it had previously stood when what he described as "the solemn judgment" in *Lane* v. *Cotton*[8] was given in 1699[9]: "In that year a solemn judgment was "given, that an action on the case would not lie against the "Post-master General, for a loss in the office by the negligence "or fault of his servant. The nation understood it to be a "judgment: and therefore it makes no difference, if what has "been thrown out were true, and the writ of error was stopped "in the way that has been mentioned." (That refers to the settlement of the action.) "For the bar have taken notice of "it as a judgment; the Parliament and the people have taken "notice of it, every man who has sent a letter since has taken "notice of it; many Acts of Parliament for the regulation and "improvement of the Post-office, and other purposes relative to "it, have passed since, which by their silence have recognized "it. The mail has been robbed a hundred times since, and no "action whatever has been brought. What have merchants done "since and continue to do at this day, as a caution and security "against a loss? They cut their bills and notes into two or "three parts, and send them at different times: one, by this "day's post, the other, by the next. This shews the sense of "mankind as to their remedy. If there could have been any "doubt therefore before the determination of *Lane* v. *Cotton*,[10] "the solemn judgment in that case having stood uncontroverted "ever since, puts the matter beyond dispute. Therefore, we are "all clearly of opinion the action will not lie."

In my judgment, what Lord Mansfield said in that case is, in all relevant respects, as true today as it was then. In particular, I think one of the important parts of the ratio of his decision was his observation that the Post Office was a branch of revenue. Sir

---

[8] 1 Ld.Raym. 646.

[9] 2 Cowp. 754, 766.

[10] 1 Ld.Raym. 646.

Frank has said that times have changed since Lord Mansfield gave his judgment, and that the position now is altogether different. He at one time appeared to me to suggest that the risk of highway robbery was less today than it was then. Of course, the number of letters carried today is very much greater than it was then, but I see no great force in that submission. The risk of wicked people interfering with the Post Office is certainly very great today. There seems to me to be no foundation for the argument that matters have so changed in that respect that we ought to arrive at a different conclusion today from that of Lord Mansfield in 1778. Moreover, it is said that the modern developments of business have produced this position, that whereas in 1778 there would not be so many cases in which the Post Office entered into contracts, the position today is that, as the modern statutes show, the Post Office or Postmaster-General is continually entering into contracts of various kinds for various purposes. One answer to that is that the position was really the same in substance at the time when the early Post Office Acts were passed, because it is clear that contracts would have to be entered into by the Postmaster-General for the hire of post-chaises and horses and so forth for the purposes of the business. There is no difference in kind between the position today and the position then.

That being the position historically, the Post Office relies in particular on the provisions of the Post Office Act, 1908. In my judgment, the Post Office Act, 1908, to which I need not refer in very great detail, clearly proceeded on the footing that no contractual obligation arises between the Post Office and the sender of a letter in circumstances such as these. The Act of 1908 is a consolidating Act. By section 1 it is made clear that postal packets subject to charge are the subject of a duty: "Subject to the provisions of this Act, there shall be charged "by the Postmaster-General for the use of His Majesty the King "on all postal packets which are conveyed or delivered for con-"veyance by post under the authority of the Postmaster-General "such postage and other sums as may be fixed in manner "provided by this Act." The power to fix rates of postage is vested in the Treasury. Under section 12 of the Act, in combination with the enabling power in section 82 of the same Act, regulations have been made. Section 12 reads: "All postal "packets shall be posted, forwarded, conveyed, and delivered "subject to such provisions, conditions, prohibitions, and "restrictions respecting the time and mode of posting and "delivery, and of the payment of postage and other sums in "respect thereof chargeable under this Act or any warrant or "regulations made under this Act, and respecting the registration of, and giving receipts for, and giving and obtaining "certificates of posting and delivery of, any postal packet, and "the sums to be paid in addition to any other postage for that "registration, receipt, or certificate, and respecting stamps, "covers, form, dimensions," and so forth, "as may be directed "by Post Office regulations."

The British Commonwealth and Foreign Post Warrant, 1948 (S.I. 1948, No. 590), contains a number of regulations to which we have been referred. Regulation 44 provides: "Registration. "Outgoing packets may be registered. (1) Subject to the pro"visions of this warrant any outgoing postal packet (except a "magazine for Canada and Newfoundland) may be registered." Regulation 49: "Compensation for loss. Subject to the pro"visions of this Warrant:—(a) if any article of pecuniary value, "enclosed in or forming part of a registered postal packet other "than an insured letter, be lost or damaged so as entirely to "destroy its value whilst in the custody of the Postmaster "General, the Postmaster General may pay to any person or "persons who may in the opinion of the Postmaster General "establish a reasonable claim to compensation (having regard "to the nature of the article, the care with which it was packed, "and other circumstances) such sum not exceeding £2 18s. as "he may think just." That provides for a discretionary payment to be made by the Postmaster-General. Regulation 61 is the relevant regulation which was pleaded by the defendant Post Office in this case: "Compensation may be paid out of aids "provided by Parliament. The Postmaster General may give "effect to the provision of this Warrant as to the loss or damage "of registered postal packets, insured letters and insured boxes, "and of articles enclosed in or forming part of a registered postal "packet, insured letter or insured box, out of such aids or "supplies as may be from time to time provided and appropriated "by Parliament for that purpose,". It continues—and I emphasize these words: "but nothing contained in or done "under or in pursuance of this Warrant shall render him liable "either personally or in his official capacity, to any action or "other legal proceeding in respect of or in consequence of any "such loss or damage. The decision of the Postmaster-General "on all questions arising between him and any person claiming "payment in respect of the loss or damage of a registered postal "packet, insured letter, or insured box or of any article enclosed "in or forming part thereof shall be final and conclusive."

Section 13 of the Post Office Act, 1908, provides: "Liability "for loss of postal packets. The registration of or giving a "receipt for a postal packet, or the giving or obtaining of a "certificate of posting or delivery of a postal packet, shall not "render the Postmaster-General or the Post Office revenue in "any manner liable for the loss of the packet or the contents "thereof."

Sir Frank has argued that the effect of regulation 61 and of section 13 of the Post Office Act, 1908, does not exclude the possibility—or, indeed, in his case, as he submits, the correctness of a decision—that there is a contract between the parties on the admitted facts in this case; but, in my opinion, that regulation and section 13 clearly indicate that Parliament and those who made the regulations under the authority of Parliament were proceeding on the footing that no loss of the contents of a postal packet arising out of contract could be recovered. That reading of the matter is, I think, the plain reading of section 13, which envisages a set of circumstances in which a contract might reasonably be inferred. Nevertheless, the registration does not render the Postmaster-General or the Post Office revenue in any manner liable for the loss of a packet or the contents thereof. It would be strange if that language were to be treated as recognizing the possibility of a contractual liability existing apart from the registration or the giving of a certificate in connexion with the registration.

The only other statutory enactment to which I wish to refer is the Crown Proceedings Act, 1947. I should first state that the action is brought against the Post Office, and not against the Postmaster-General, by virtue of the directions given in the Crown Proceedings Act, 1947. The only section for consideration here is section 9. Subsection (1) of that section provides: "Subject as hereinafter provided, no proceedings in tort shall "lie against the Crown for anything done or omitted to be done "in relation to a postal packet by any person while employed as "a servant or agent of the Crown, or for anything done or "omitted to be done in relation to a telephonic communication "by any person while so employed; nor shall any officer of the "Crown be subject, except at the suit of the Crown, to any civil "liability for any of the matters aforesaid." That deals with the claim in tort which has not been proceeded with because that section, it is recognized, bars such proceedings. Subsection (2) provides: "Notwithstanding the provisions of section 13 of the "Post Office Act, 1908, proceedings shall lie against the Crown "under this subsection in respect of loss of or damage to a "registered inland postal packet, not being a telegram, in so "far as the loss or damage is due to any wrongful act done or "any neglect or default committed by a person employed as a "servant or agent of the Crown while performing or purporting "to perform his functions as such in relation to the receipt, "carriage, delivery or other dealing with the packet." Therefore, the effect of the Crown Proceedings Act, 1947, is that a member of the public is in a stronger position than he had previously been in in respect of any wrongful act done by a servant of the Post Office in connexion with the loss of or damage to an inland postal packet; but it is to be noted that that subsection excludes overseas postal packets.

Those are all the legislative provisions to which it is necessary to refer, which confirm the view expressed on the earlier statutes; and to my mind, by themselves, even apart from the earlier authorities, they make it exceedingly difficult to entertain an argument such as that addressed to us on behalf of the plaintiffs in this case.

The only other matter to which I should refer (for it might be thought that members of the public might be misled into thinking that they had entered into a contract with the Post Office in circumstances such as these) is the Post Office Guide, a document which is accessible to the public and for sale to the public, and which at page 74 contains this: "Additional information. The Post Office does not enter into a contract of carriage "either express or implied. It accepts postal packets for transmission by post under, and subject to, the provisions of the "Post Office Acts and the Regulations made thereunder."

For these reasons, in my opinion, the judge was right. There was no contract entered into between the plaintiffs and the defendant. I add only this, that I think it would have been difficult to answer favourably to the plaintiffs the question which has arisen in this case, without endeavouring at any rate to ascertain what the terms of the contract were; but the way in which the case was left was this: Aye or no, was there in law or in fact a contract at all? On the admitted facts, the plaintiffs have not been able to show that there was any contractual relationship between them and the Post Office on which they could succeed. In my opinion, therefore, this appeal should be dismissed.

PARKER L.J. I agree. It is, of course, clear that if A entrusts a letter to B to be carried to C, and B receives remuneration for his services, a contractual tie results between A and B. It is also clear that the Postmaster-General has power to contract; and the only question here is whether, when A entrusts to the Post Office a postal packet for transmission overseas, a contractual tie results. Clearly the Postmaster-General is in a position quite different from that of a private individual. He is responsible to the Crown for running a public service and, incidentally, a monopoly. The money that is paid by the public is revenue. So far as this case is concerned, I find it unnecessary to go further into those arguments, because, as it seems to me, there are three matters which, taken together at any rate, are conclusive against the plaintiffs in this case: (1) In 1701, in *Lane* v. *Cotton*,[11] and in 1778, in *Whitfield* v. *Lord Lé Despencer*[12]—true, both actions on the case—there were strong dicta, to which my Lord has referred, to the effect that the Postmaster-General enters into no contract for the carriage of postal packets, and those dicta have never been questioned; (2) so far as is known, no one before those cases, in those cases, or since those cases, has ever brought before the courts a claim alleging that there was any such contract; and (3) in subsequent legislation Parliament has clearly acted on the basis that that is the true legal position. Thus, it seems to me that section 13 of the Post Office Act, 1908, proceeds on the basis that the mere acceptance of a postal packet does not create any contractual tie. That section must be dealing with contract, because I do not think it could be suggested that registration or the giving of a receipt for a postal packet could add any liability in tort. Accordingly, it is dealing with contract.

Sir Frank Soskice suggested that that section only provided that the mere fact of registration, the mere fact of giving a receipt, did not create any added obligation. It seems to me that the answer to that is that the section does not say so. In the background against which it was passed it seems to me clearly to be anticipating an argument which might be raised, that in the case of a registered postal packet the position was different and that a contract could be said to be created by the registration and the giving of a receipt. Again, it seems to me that the regulations made by warrant under the Act of 1908 proceed on that basis. The relevant warrant in this case is the British Commonwealth and Foreign Post Warrant, 1948, and it

[11] 1 Ld.Raym. 646.

[12] 2 Cowp. 754.

is sufficient to mention regulations 49 and 61, without reading them, as showing that the Warrant and the regulations proceed on that basis. Finally, in more recent times, in 1947, section 9 of the Crown Proceedings Act, 1947, seems to me to proceed on the basis that, so far as overseas post is concerned, the Postmaster-General is not liable. It is true that that section is clearly dealing with tort; but, for myself, I find it inconceivable that if Parliament thought that there was any doubt as to the contractual position (or, rather, the absence of a contract) it would not have been dealt with clearly in the Act. In those circumstances, it seems to me that the forceful words of Lord Mansfield at the end of his judgment,[13] which my Lord has read, apply today and in this case with added force.

I would only add that reference was made to the Post Office Guide which is mentioned on the certificate of posting—the receipt given for the registered packet. It seems to me perfectly clear that if no contract otherwise exists, the terms of that Guide cannot possibly create a contract. Accordingly, I agree that this appeal should be dismissed.

ORMEROD L.J. I agree, for the reasons which have been fully set out by my brethren, and there is nothing I wish to add.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *Chamberlain & Co.; Solicitor, The Post Office.*

M. M. H.

---

[13] 2 Cowp. 754, 766.

1957
Feb. 27, 28;
Mar. 1, 4, 14.

Ashworth J.

DAVIE *v.* NEW MERTON BOARD MILLS LTD.

Negligence—Safe system of work—Plant and equipment—Latent defect—Injury to workman's eye caused by tool with latent defect—Tool supplied by reputable supplier—Tool made by reputable makers—Tool negligently made—Employers' liability—Makers' liability.
Negligence—Duty of care—Manufacturer.

The plaintiff, a maintenance fitter, was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift, which had been provided for the plaintiff's use by his employers, although apparently in good condition, was of excessive hardness, and was in the circumstances a dangerous tool; it had been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers who, in turn, had sold it to the employers.

The plaintiff claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool, and against the makers on the ground that, as the manufacturers of the drift, they were under a duty to those who they contemplated might use it. The makers contended that as the plaintiff had not used the drift with the socket for which it was designed it had not been used in the manner for which it had been supplied and, therefore, they were not liable:—

Held, (1) that the employers could not escape liability for breach of their personal obligation as employers merely by proving that they had taken care to buy an apparently sound tool from a reputable supplier, and they were, therefore, liable to the plaintiff for the injury caused by the dangerous tool.

Dictum of Lord Maugham in *Wilsons and Clyde Coal Co.* v. *English* [1938] A.C. 57, 88; 53 T.L.R. 944; [1937] 3 All E.R. 628; dictum of Goddard L.J. in *Paine* v. *Colne Valley Electric Supply Co. Ltd.* [1939] W.N. 19; 55 T.L.R. 181; [1938] 4 All E.R. 803, 808, and dictum of Lord Thomson in *Donnelly* v. *Glasgow Corporation*, 1953 S.L.T. 161, 168 applied.

Mason v. *Williams & Williams Ltd.* [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808 not followed.

(2) That use of a tool for a different, albeit similar, purpose from that for which it was intended did not ipso facto absolve the manufacturer from liability; and here the use of the drift by the plaintiff was not so foreign to the intended use as to do so.

Donoghue v. *Stevenson* [1932] A.C. 562; 48 T.L.R. 494 and *Grant* v. *Australian Knitting Mills* [1936] A.C. 85; 52 T.L.R. 38 considered.

ACTION.

The plaintiff, James Gibson Davie, was at all material times employed by the first defendants, the New Merton Board Mills Ltd., as a maintenance fitter. On March 8, 1953, in the course of his employment, the plaintiff was using a drift provided by his employers for use by their fitters, to knock out a metal key which he was trying to fit into a coupling. He struck the head of the drift with a hammer, and at the second blow, which was not unreasonably hard, a piece of metal flew off the head of the drift into the plaintiff's eye and caused injury. The drift had been purchased by the first defendants from a reputable supplier, C. A. Baldwin & Co., who, in turn had bought it from the manufacturers, the second defendants, Frank Guylee & Son Ltd.

The plaintiff claimed damages for negligence against the first defendants on the ground that they had provided for his use a defective tool; and against the second defendants alleging that they, as manufacturers, were under a duty to those whom they contemplated would use the drift. At the trial of the action the court found that the hardness of the drift was greatly in excess of the hardness which should have existed having regard to the fact that it was intended and designed to be struck on its head with a hammer, and that this condition would not have occurred if proper care had been taken by the second defendants in the manufacture; further, that in the circumstances the drift was dangerous in that chips or particles might fly off it when struck.

The first defendants denied liability. The second defendants contended that the plaintiff, at the time of the accident, was not using the drift in conjunction with the sleeve or socket for which it was intended and supplied and that, because the drift was not put to the actual use for which it was intended, they were not liable.

Martin Jukes Q.C. and *Malcolm Morris* for the plaintiff. It is the common law duty of employers to provide proper equipment for their workmen. There is a conflict of judicial authority on the question whether employers who have bought their equipment from a reputable supplier have discharged their duty and can escape liability: see *Donnelly* v. *Glasgow Corporation*[1] and *Mason* v. *Williams & Williams Ltd.*[2] If the principle stated by Finnemore J. in *Mason's* case[3] be correct in law the plaintiff's claim against the employers must fail. There are, however, authorities which were not cited to Finnemore J. which strongly support the plaintiff's claim: *Wilsons and Clyde Coal Co.* v. *English*,[4] *per* Lord Wright[5] and Lord Maugham[6]; *Paine* v. *Colne Valley Electric Supply Co. Ltd.*,[7] *per* Goddard L.J.,[8] and *Donnelly* v. *Glasgow Corporation*, *per* Lord Thomson.[9] On these authorities the employer's duty to his workmen to take reasonable care is a personal duty and he cannot escape liability by proving that he has bought a piece of apparently sound equipment from a reputable supplier.

---

[1] 1953 S.L.T. 161.

[2] [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808.

[3] [1955] 1 W.L.R. 549, 550, 551.

[4] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[5] [1938] A.C. 57, 83.

[6] Ibid. 88.

[7] [1939] W.N. 19; 55 T.L.R. 181; [1938] 4 All E.R. 803.

[8] [1938] 4 All E.R. 803, 807.

[9] 1953 S.L.T. 161, 168.

The plaintiff's cause of action against the second defendants, the manufacturers of the drift, comes within the principle of *Donoghue* v. *Stevenson.*[10] The drift should not have been sent out brittle by the manufacturers. The plaintiff had no chance of intermediate examination and, therefore, the second defendants are liable to him in damages.

Tudor Evans for the first defendants. For injury resulting from defective plant and premises an employer is liable if the defect is due to his own negligence or that of his servant or agent. An independent contractor is not the agent of the employer, neither is an independent supplier. Lord Thomson's dictum in *Donnelly's* case [11] that an independent supplier is the agent of the employer is inapplicable, because it is not in accordance with the principles laid down by the English courts. An employer is not liable to his workman for injuries caused by defects in the premises of a third party where the workman has been sent to do work: see *Cilia* v. *H. M. James & Sons* [12] and *Taylor* v. *Sims and Sims,*[13] although the employers are liable if the defect is obvious: *Thomson* v. *Cremin.*[14] Similarly, if the defect in a tool is obvious, the employer is liable if he takes no steps to protect the workman. There is no distinction between the position of an employer vis-à-vis the defects in a tool purchased from a reputable supplier and his position vis-à-vis the defects in the premises of a third party. The first defendants, therefore, need only show that they bought the drift from reputable suppliers to escape liability. *Hodgson* v. *British Arc Welding Co. Ltd.*[15] supports the view that the first defendants are entitled to rely on the second defendants. *Paine's* case,[16] which is in conflict with *Hodgson's* case,[15] is distinguishable.

This case is within *Mason* v. *Williams & Williams Ltd.*[17] The only duty on the employers was to take reasonable care: *Wilsons and Clyde Coal Co.* v. *English.*[18] An employer does not warrant the tools he supplies: *Harris* v. *Brights Asphalt Contractors Ltd.*[19] The first defendants did not delegate their duty to the second defendants; their duty only arose when they received the drift from the suppliers and that duty was no more than to take reasonable care. That duty was discharged by buying the tool from a proper source. If this be wrong, the employer becomes an insurer: *Cilia* v. *H. M. James & Sons.*[20] The defect in the drift was latent to the employers in that it was not discoverable by the exercise of reasonable care, and they escape liability on that ground also.

---

[10] [1932] A.C. 562; 48 T.L.R. 494.

[11] 1953 S.L.T. 161, 168.

[12] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

[13] [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375.

[14] 1941; [1956] 1 W.L.R. 103n., 111; [1953] 2 All E.R. 1185.

[15] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.

[16] [1938] 4 All E.R. 803.

[17] [1955] 1 W.L.R. 549.

[18] [1938] A.C. 57.

[19] [1953] 1 Q.B. 617; [1953] 1 All E.R. 395.

Norman Richards Q.C. and *Michael Hoare* for the second defendants. There is no authority that makes a supplier liable under the principle in *Donoghue* v. *Stevenson*,[21] except in the case of something inherently dangerous. Further, for that case to apply the plaintiff must prove strictly that these defendants made the drift, and he has failed to do that. Thirdly, the drift was used by the plaintiff as a punch, i.e., as something for which it was not supplied. That is a vital matter in considering liability under *Donoghue* v. *Stevenson*,[21] which applies only to the use of an article for the purpose for which it was supplied. The dictum of Lord Atkin as to "Who then in law is my neighbour?"[22] is based on whom a reasonable man should anticipate as his neighbour. If a manufacturer supplies a drift to suit a particular process it is unreasonable that he should be expected to have foreseen as his neighbour someone who uses it for another process. *Donoghue* v. *Stevenson*[23] applies only where an article is specifically consumed or used in the way for which it was intended by the manufacturer—the principle of that case must be limited in some way, and the limitation is the use for which the article is supplied: if it be used in another way, the protection of that case cannot be claimed.

Jukes Q.C. in reply. The argument that an employer can do no more than obtain tools from a reputable manufacturer is based on a false premise. He is under a personal duty and in that respect is liable for the negligence of his agent, and an independent contractor is an agent. An employer does not warrant that the tools are suitable, but he does warrant that care has been taken: *Haseldine* v. *Daw* (*C. A.*) *& Son Ltd.*[24] There is a difference between a duty to take care and a duty to see that care has been taken. An employer warrants that the premises have been made safe by the exercise of reasonable care and skill, whether warranting the care and skill of himself or that of a contractor: *Thomson* v. *Cremin.*[25] The duty of an employer to provide safe premises cannot be discharged by delegation to a competent contractor: *Paine* v. *Colne Valley Electric Supply Co. Ltd.*[26] It is unjust to a workman that there should be no action against his employer but only against the manufacturer, for it is often difficult for the workman to discover who the manufacturer is.

---

[20] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

[21] [1932] A.C. 562.

[22] Ibid. 580.

[23] [1932] A.C. 562.

[24] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156 (C.A.).

[25] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

On the liability of the second defendants, it matters not that the damage occurred in a way that was not anticipated: *Thurogood* v. *Van Den Berghs & Jurgens Ltd.*[27]

March 14. ASHWORTH J. reading his judgment, stated the facts and found (1) that the drift P.2 was of excessive hardness, this condition being due to lack of proper care by the second defendants during its manufacture; (2) that in the circumstances it was dangerous in that chips of metal might fly off it when struck. His Lordship continued: The problem of liability must be considered on the basis that the employers provided for their employee, the plaintiff, a dangerous tool which had been negligently made by the second defendants. I consider first the question whether in these circumstances the employers are liable. In the first place, it is clear that no negligence can be attributed to any of the employers' own servants or agents. The drift P.2 was apparently in good condition and no allegation was or could be made that the employers' system of maintenance or inspection was at fault. Moreover, the employers bought the drift from a reputable supplier and paid a reasonable price for it. The problem arises in naked simplicity: are they responsible to the plaintiff because the drift was negligently manufactured by the second defendants?

An exactly similar problem came before Finnemore J. at Chester Assizes in *Mason* v. *Williams & Williams Ltd.*,[1] and he decided it in favour of the employers. As appears from the report, no cases were cited to him in argument and he was able to approach the problem unfettered by authority. The principle on which he decided the case is as follows[2]: "I take the view that employers, if they buy reputable tools "from reputable people who make them, are not bound to set "up examinations, either before issuing a tool or after it has "been in use for days or weeks or even months, unless there is "something which calls their attention to the suggestion that

---

[26] [1938] 4 All E.R. 803.

[27] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[1] [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808.

[2] [1955] 1 W.L.R. 549, 550, 551.

"there is something wrong. Employers have to act as reasonable people, they have to take reasonable care; but if they buy their tools from well-known makers, such as the second defendants are, they are entitled to assume that the tools will be proper for the purposes for which both sides intended them to be used, and not require daily, weekly or monthly inspection to see if in fact all is well."

Mr. Martin Jukes, for the plaintiff, conceded that if the principle so stated is correct in law the claim against the employers in the present case must fail, but he went on to contend that authorities, not cited to Finnemore J., compel me to take a different view. The decision in *Wilsons and Clyde Coal Co.* v. *English*[3] was naturally the foundation on which his argument was based, and in particular the speeches of Lord Wright and Lord Maugham. Lord Maugham said[4]: "The proposition would be more correctly stated to be that his duty is to supply and instal proper machinery so far as care and skill can secure this result. He can, and often he must, perform this duty by the employment of an agent who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employers' duty. This has sometimes been expressed by saying that the duty is personal to the employer; but the adjective if unexplained is apt to mislead, like the word 'absolute' and the word 'delegate.' The employer can, of course, and frequently must delegate the performance of any of his duties to skilled agents; but it would need an altogether new implied term in the contract between employer and employee before a court could properly hold that this delegation has the result of freeing the employer from his liability."

In that case the negligence which caused the plaintiff's injury was the negligence of someone who was in the defendants' employment and it was held that they could not escape liability for breach of their personal obligation as employers merely by proving that they were careful to select a competent agent to supervise the working of the colliery. The case did not directly involve the question whether employers could escape liability by proving that they had been careful to select a competent independent contractor who turned out to be negligent.

But very shortly afterwards Goddard L.J. had to deal with this very question in *Paine* v. *Colne Valley Electric Supply*

---

[3] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[4] [1938] A.C. 57, 88.

Co. Ltd.,[5] and he said[6]: "It follows, in my opinion, not only "that there had been a breach of the Factory and Workshop "Act, 1901, but also that the first defendants had failed to "provide a safe place for their workmen, and had, therefore, "committed a breach of their common law duty as recently laid "down in *Wilsons and Clyde Coal Co. Ltd.* v. *English*.[7] This "is a duty which cannot be avoided by delegation. It is no "answer to say, as counsel for the first defendants submitted: "'We employed competent contractors to provide a safe place "'or plant.' The class of cases in which the employment of a "competent contractor affords a defence belongs to a wholly "different category in the law of negligence. I have no hesitation "in holding that the first defendants have no defence whatever "to the plaintiff's claim."

A somewhat similar question arose in Scotland in *Donnelly* v. *Glasgow Corporation*,[8] where the pursuer sued his employers for injury sustained by him when driving one of the defendants' omnibuses. The cause of the injury was a defect in the chassis, which was manufactured by independent contractors, and the defendants contended that the defect was one of design for the non-discovery of which they could not be blamed, as they relied and were entitled to rely on the manufacturers. In rejecting this contention the Lord Justice-Clerk (Lord Thomson) said[9]: "So "far as the driver's and conductor's cases are concerned, they "both being servants of the corporation, I have no doubt that "the defences are irrelevant. It is admitted by the corporation "that the omnibus was defective and they aver that their "suppliers were responsible for the defective condition. But on "this branch of the law a master cannot escape liability to his "servant for defective plant by blaming his agents. The personal "responsibility which the law lays on the master in respect of "plant covers the activities of any person whom the master "employs to provide that plant. The supplier and the master "are as one. If then the supplier erred, the master is saddled "with the results of that error. It may be that the master is "able to have recourse against the supplier on account of his "error, but that is no concern of the injured servant and, indeed, "one of the reasons behind the development of this branch of the "law is to give the workman the advantage of being able to go "directly against his master. Of course, the master does not

---

[5] [1939] W.N. 19; 55 T.L.R. 181; [1938] 4 All E.R. 803.

[6] [1938] 4 All E.R. 803, 807.

[7] [1938] A.C. 57.

[8] 1953 S.L.T. 161.

[9] Ibid. 168.

"warrant the plant and he is not liable in the case when the "defect is latent in the sense that it was not discoverable by "the exercise of reasonable care. If the position in the present "case had been that the corporation had been able to say that "neither they, nor their suppliers, could have discovered the "defect by means of any reasonable inspection, the defence would "be relevant. But, as I have already said, the corporation agree "that the defect was patent to their suppliers and that in this "branch of the law means that it was patent to them."

For the employers Mr. Tudor Evans acknowledged that in regard to defective plant or premises an employer must accept responsibility if the defect is due to negligence on the part of the employer himself or on the part of someone who can properly be described as the employer's servant or agent. But he contended that the term "agent" should not be applied to an independent contractor, and he urged me not to follow the decision in *Donnelly's* case[10] in which the Lord Justice-Clerk equated independent suppliers with agents[11]: "The supplier and the "master are as one." In support of this contention he prayed in aid decisions in which employers have escaped liability to their employees when the cause of the injury has been a defect in premises occupied by third parties to which the employees had been sent to work. See, for example, *Taylor* v. *Sims and Sims*,[12] and *Cilia* v. *H. M. James & Sons*.[13]

In *Hodgson* v. *British Arc Welding Co. Ltd.*,[14] Hilbery J. said[15]: "In accordance with the usual custom, the first defen- "dants' workmen, including the plaintiff, found a stage and "scaffolding provided by the second defendants, and there was "no reason to suppose that it would not be a reasonably safe "scaffolding. I think that it is putting the duty of an employer "in those circumstances too high to say that an electric arc "welding firm, or any other sub-contractor doing a specialized "type of work, is under a duty separately to inspect every piece "of scaffolding in order to see that what the shipwright has "done has been done with proper care and skill. They are not "competent, or qualified, to criticize what the shipwright does "in the way of erecting a scaffolding. The shipwright is an "expert in the matter, whereas the sub-contractors probably "know nothing about it. It would be ridiculous to say that the

---

[10] 1953 S.L.T. 161.

[11] Ibid. 168.

[12] [1942] W.N. 124; 58 T.L.R. 339; [1942] 2 All E.R. 375.

[13] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

[14] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.

[15] [1946] K.B. 302, 304.

"employer in those circumstances was responsible to his work-"men, because he, who knows nothing about the erection of "scaffoldings, and how to make them reasonably safe, did not "inspect with the eye of ignorance the work which was being "done with the eye of knowledge and skill. I do not think that "there was any breach of duty owed in law by the first defendants "which led to this accident."

In this class of case an employer will not escape liability to his injured employee if the dangerous condition of the third party's premises was manifest and the employer took no action about it. As Lord Wright said in *Thomson* v. *Cremin*[16]: "No "doubt if there are apparent indications which he observes, or "ought to observe, that the structure is defective, he owes a duty "to take reasonable measures for the protection of his men."

In accordance with this last-mentioned principle, Mr. Tudor Evans recognized that if equipment obtained by an employer from an independent supplier was manifestly defective, an employer would be liable if he issued such equipment to an employee and injury resulted. But he went on to submit that there was no logical distinction between an employer's position in regard to a third party's premises and his position in regard to equipment reasonably and perhaps necessarily obtained by him from an independent supplier. In substance his argument came to this: (a) an employer's duty is to take care himself and is not a duty to see that care is taken by other persons not in his employment or under his control; (b) in the present case the employers fully discharged their duty to take care.

In my judgment, notwithstanding the decision of Finnemore J. in *Mason's* case,[17] from which I am naturally reluctant to differ, the authorities to which I have referred constrain me to hold the employers liable. In addition, there is another passage in Lord Wright's speech in *Thomson* v. *Cremin*[18] which may usefully be cited: "The duty of the invitor towards the invitee is, "in my opinion, a duty personal to the former, in the sense that "he does not get rid of the obligation by entrusting its perform-"ance to independent contractors. It is true that the invitor is "not an insurer: he warrants, however, that due care and skill "to make the premises reasonably safe for the invitee have been "exercised, whether by himself, his servants, or agents or by "independent contractors whom he employs to perform his duty. "He does not fulfil the warranty merely by leaving the work to

---

[16] [1956] 1 W.L.R. 103n., 111; [1953] 2 All E.R. 1185.

[17] [1955] 1 W.L.R. 549.

[18] [1956] 1 W.L.R. 103, 110.

"contractors however reputable or generally competent. His "warranty is broken if they fail to exercise the proper care and "skill." It is true that Lord Wright is there dealing with the position of an invitor, but the duty of an employer to his workmen is certainly no less. Indeed, in *London Graving Dock Co. Ltd.* v. *Horton* [19] Lord Porter said [20]: "Admittedly the duty of a "master to his servant is higher than that of an invitor to his "invitee."

For the sake of completeness, I should add that Mr. Tudor Evans also contended that the employers should escape on the ground that the defect in the drift was latent, or at least latent to them. While I am satisfied that the employers were unaware of any defect in the drift, and could not reasonably have discovered it, I am also satisfied that the defect was not latent so far as the second defendants were concerned. If the employers were to escape on the ground that the defect was latent, they would in my view need to establish that it was latent in regard to the second defendants. This very point was considered by the Lord Justice-Clerk in *Donnelly's* case [21] and I respectfully follow that decision.

Much of Mr. Norman Richards' argument for the second defendants was addressed to the question whether the plaintiff had proved that the particle in his eye came from the drift P.2 and that the drift in question was manufactured by the second defendants. On those points the second defendants have failed. But it was still contended that they were under no liability to the plaintiff and that *Mason's* case,[22] in which the manufacturers of the chisel were held liable, was no authority to the contrary. It is true that at the time when the plaintiff met with his accident he was not using the drift in conjunction with the sleeve or socket for which it was designed and supplied. He was using the drift in order to knock out a metal key which he was trying to fit into a coupling. The key was too large for the opening and, when removed, would have to be filed down. As already stated, I accept the plaintiff's evidence that he did not strike an unreasonably hard blow, and although as a rule a drill could be released from a sleeve or socket by means of a light blow, the evidence satisfied me that even if the drift were used solely for that purpose, occasions would probably arise when the drift

[19] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[20] [1951] A.C. 737, 746.

[21] 1953 S.L.T. 161.

[22] [1955] 1 W.L.R. 549.

would have to be struck at least as hard as it was struck on the day in question.

The question, therefore, arises whether it is enough for the second defendants to show that the use to which the drift was actually put was not the use for which the drift was supplied, even though the stress on the drift would have been the same in both cases. The argument for the second defendants was put in a two-fold form, although both forms were founded on the premise that the plaintiff was using the drift for a purpose and in a manner different from that intended by the second defendants. In the first place, it was said that by using the drift as he did the plaintiff took himself out of the class of persons comprehended in the word "neighbour" used and explained by Lord Atkin in *Donoghue* v. *Stevenson*.[23] Secondly, it was said that the duty of care only extended to occasions when the drift was used in the manner intended, and reference was made to the judgment of the Privy Council in *Grant* v. *Australian Knitting Mills*,[24] in which these words occur[25]: "Equally also may the word "'control' embarrass, though it is conveniently used in the "opinions in *Donoghue's* case[26] to emphasize the essential factor "that the consumer must use the article exactly as it left the "maker, that is in all material features, and use it as it was "intended to be used."

While I would accept the contention that use of an article for a purpose materially different from that for which the maker designed it or which he might reasonably be taken to have contemplated might afford him an answer to a claim founded on the article's dangerous or defective condition, I do not think that such an answer is available to the second defendants in the present case. Maybe it is a question of degree and, in so far as that is correct, I hold that the use of the drift by the plaintiff was not so foreign to the use intended or contemplated as to absolve the second defendants from liability. I do not agree with the contention that use for a different, albeit similar, purpose ipso facto frees the makers from liability. In support of this contention it was urged that by giving effect to it, the court would be spared the difficult task of comparing the actual with the intended use and the possible effect of each upon the article. This way of escape may appear attractive but in my view the task of comparing the uses ought to be undertaken, and the question is ultimately one of fact.

---

[23] [1932] A.C. 562; 48 T.L.R. 494.

[24] [1936] A.C. 85; 52 T.L.R. 38.

[25] [1936] A.C. 85, 104.

[26] [1932] A.C. 562.

1957

Davie v. New Merton Board Mills Ltd.

Ashworth J.

In my judgment, the second defendants are liable to the plaintiff because their servants were negligent in the heat treatment of the drift P.2, which was supplied by them in a condition likely to cause danger to anyone using it. I also hold that no intermediate examination of the drift between the time of the manufacture and the time of its actual use was reasonably to be expected. It seems to me wholly unreasonable to expect an employer to test a drift for hardness before issuing it to his employee, and no other examination would have revealed the danger existing in this particular drift.

Mr. Norman Richards did not argue before me any point on the Limitation Act, but expressly reserved the right to do so on appeal, when in his view there would be more scope for him to challenge or distinguish cases binding on me.

Judgment for the plaintiff for £2,030 against both defendants.
Order for 100 per cent. contribution as against second defendants.

Solicitors: *W. H. Thompson; E. P. Rugg & Co.; Doyle, Devonshire & Co. for Kershaw, Tudor & Co., Sheffield.*

P. P.

1957
May 14, 24.

Lord Goddard C.J., Hilbery and Devlin JJ.

MELIAS LTD. *v.* PRESTON AND ANOTHER.

Weights and Measures—Offence—"Actual offender"—Conviction of a company—Liability of manager—Sale of Food (Weights and Measures) Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *ss.* 4 (2), 12 (5).
Judicial Precedent—Divisional Court decision—Per incuriam—Not binding on Divisional Court.

The appellants were convicted of three offences under section 4 (2) of the Sale of Food (Weights and Measures) Act, 1926, for having in their possession for sale certain pre-packed articles of food, which should have been, but which were not, made up in one of the quantities specified in the section. It was contended that the penalties should be imposed, not on the appellants, but, in accordance with section 12 (5), on the actual offender, who was the manager of one of their shops.

[Reported by David Calcutt, Esq., Barrister-at-Law.]

The subject-matter of the first two summonses was prepared for sale by the manager, but when the goods were checked by an inspector of weights and measures the manager was absent. The subject-matter of the third summons was not prepared for sale by the manager, but when the goods were checked by the inspector the manager was present; it was his duty to check the weight. He had been properly instructed as to his duties in these respects. The justices convicted the appellants and acquitted the manager on all three summonses:—

Held, that the words "actual offender" in section 12 (5) meant the person whose act or default brought about the particular circumstances that constituted the offence; that in the present case the manager remained in possession of the goods, though temporarily absent, and it was due to his acts that the offences were committed; accordingly, although the appellants were rightly convicted, they should be exempt from penalties and the manager should be convicted and penalized.

Per Lord Goddard C.J. The use of such a wide and non-technical expression as "actual offender" indicates, in my opinion, that the court is not to be concerned with nice matters such as the distinction between possession in law and custody in fact or that in law the party to a sale is the owner of the shop or of the goods sold and not the shop assistant who sells on his behalf. It is the physical act that matters.

Hotchin v. *Hindmarsh* [1891] 2 Q.B. 181; 7 T.L.R. 513 applied.

A. Walkling Ltd. v. *Robinson* (1930) 46 T.L.R. 151 not followed.

As *Hotchin's* case was not cited to the court in *Walkling's* case, this court was not bound to follow the expressions in the latter, which were per incuriam.

Young v. *Bristol Aeroplane Co.* [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293 applied.

CASE STATED by the Royal Leamington Spa justices.

On October 26, 1956, three informations were preferred by the first-named respondent, John Sidney Preston, acting on behalf of the Warwickshire County Council against the appellants, Melias Ltd. The first and second informations charged that on October 3, 1956, the appellants unlawfully did have in their possession for sale certain pre-packed articles of food of one of the kinds set forth in the First Schedule to the Sale of Food (Weights and Measures) Act, 1926,[1] namely, 13 packets of lard and 10 packets

---

[1] Sale of Food (Weights and Measures) Act, 1926, s. 4 (2): "A "person shall not sell or have in his "possession for sale any pre-packed "article of food of any of the kinds "set forth in the First Schedule to "this Act, unless—(*a*) the article is "made up for sale in quantities of "two ounces, or in multiples of two "ounces up to a limit of eight "ounces, in multiples of a quarter of "a pound up to a limit of two "pounds, in multiples of half a "pound up to a limit of four pounds, "or in multiples of one pound . . ."

S. 12 (5): "Where an employer

of dried peas respectively, which were not made up in one of the quantities specified in section 4 (2) of the Act. The third information charged that on October 18, 1956, the appellants unlawfully had in their possession for sale a packet of butter which was not made up in one of the quantities specified in section 4 (2) of the Act.

The informations were heard by the justices on December 10, 1956, when they convicted the appellants. On that day, the appellants having served notice in accordance with the provisions of section 12 (5) of the Act in relation to each of the informations, the second respondent, Victor Reynolds, was brought before the court on informations preferred by the appellants charging him that in relation to the informations against them, they having used due diligence to enforce the execution of the Act, the second respondent had committed the offence in question without their consent, connivance or wilful default, and that he was the actual offender.

The justices dismissed the informations preferred by the appellants against the second respondent.

On the hearing of the informations the following facts were found by the justices: The appellants were a limited company owning, inter alia, a grocery stores at Clemens Street, Leamington, of which the second respondent was the manager. On October 3, 1956, one Alan Evans, a duly appointed officer under the Act, entered the stores and weighed the contents of certain pre-packed articles of food, including 13 packets of lard and 10 packets of peas. On that date the second respondent was absent with leave from the stores. None of the packets was made up in accordance with section 4 of the Act and each was of short weight. The packets of lard were weighed up and packed at the stores by the second respondent on a date previous to his absence with leave. On October 18, 1956, one, Raymond George Funnell, a duly appointed officer under the Act, entered the above stores and, in the presence of the second respondent, weighed the contents of certain pre-packed articles of food, including one packet of butter. The packet was not made up in accordance with

"or principal is charged with an "offence against this Act, he shall "be entitled on information duly laid "by him . . . to have any other person whom he charges as the actual "offender brought before the court ". . . and, if . . . the employer or "principal proves to the satisfaction "of the court that he had used due "diligence to enforce the execution "of this Act, and that the said other "person had committed the offence "in question without his consent, "connivance or wilful default, the "said other person shall be summarily convicted of the offence and "the employer or principal shall be "exempt from any penalty."

section 4 of the Act, and was of short weight. The second respondent, as manager, was in charge of the shop and was responsible that the articles weighed in the shop were weighed and made up for sale in accordance with the section; and he was under direct and positive instructions from the appellants that he should so weigh and make them up. The second respondent was experienced in his duties and had been employed by the appellants for 30 years. He had been properly and sufficiently instructed as to the provisions of the Act and his duty to comply therewith.

It was contended by the appellants that, while offences under section 4 of the Act had been established, the appellants had satisfied the court that they had used due diligence to enforce the execution of the Act, and that the offences in question were committed without their consent, connivance or wilful default, and that they should be exempt from any penalty in relation to any of the offences charged.

It was contended by the first respondent that the second respondent could not be the actual offender in relation to any of the said offences because, as manager of the stores, he could not be held to have been in possession of the articles of food. In relation to the offences of October 3, 1956, he could not be the actual offender because, although he weighed up and packed the articles of food at an earlier date, he was not on the date in question present in the stores.

The justices were of opinion that the provisions of section 12 (5) of the Act could not be applied to the offences committed on October 3, 1956, having regard to the decision in *A. Walkling Ltd.* v. *Robinson*,[2] and further that, although they accepted that the second respondent was responsible for weighing the goods in question, he could not be the actual offender because he was absent with leave from the shop at the time. Secondly, that the provisions of section 12 (5) could not be applied to the offence committed on October 18, 1956, having regard to *A. Walkling Ltd.* v. *Robinson.*[2] Accordingly, they dismissed the appellants' informations against the second respondent.

John Thompson Q.C. and *J. M. Davies* for the appellants. It is the intention of Parliament that the person who is morally to blame shall be punished. Both the Sale of Food (Weights and Measures) Act, 1926, and the Food and Drugs Act, 1938, contain vicarious liability provisions, and both have the same object in view, but the method of achieving it differs: *Malcolm* v. *Cheek.*[3]

---

[2] (1930) 46 T.L.R. 151.

The expression "actual offender" means "the person whose act or default brought about the particular circumstances that "constituted the offence." Responsibility for a breach of the provisions of the Act does not stop with the company but extends to its servants: see *Hart* v. *Hudson Bros.*,[4] where the manager of a grocery shop was brought before the court as the "actual "offender." To protect the customer Parliament has sought to impress upon employees the necessity of complying with statutory requirements. In these circumstances it is clearly the physical act that matters: *Hotchin* v. *Hindmarsh.*[5] "In possession" is to be construed not in a technical, but in a popular, sense: *Webb* v. *Baker.*[6] A person having mere bailment can have possession: *Moore* v. *Robinson.*[7] The justices were not constrained by the decision in *A. Walkling Ltd.* v. *Robinson*[8]: the opinion of Lord Hewart C.J. to the effect that certain foodstuffs were in the possession of the employer and not the employee was, at best, obiter dicta. If, indeed, the opinion of Lord Hewart were binding on this court, all employers would be deprived of the protection afforded by section 12 (5), for an offence against section 4, of the Sale of Food (Weights and Measures) Act, 1926. The subsection must be given business efficacy.

Paul Wrightson for the first respondent. *A. Walkling Ltd.* v. *Robinson*[8] is the only authority on the point which is at present before the court, and ought accordingly to be followed. The point was never considered in *Hart* v. *Hudson Bros.*,[9] which related to the duty of a shop-manager to weigh goods properly. This being a criminal act, it should be construed strictly: "popular" interpretations are out of place. The vicarious liability provisions of the Sale of Food (Weights and Measures) Act, 1926, and the Food and Drugs Act, 1938, may aim at a common object, but it is achieved in each by different means; the expression of these differences necessarily differs. These differences must be recognized. One of them is that although under the Act of 1938 a company may be able to shift the penalty for certain offences on to an employee, it cannot do so under the Act of 1926. In the present case the appellants cannot shift the penalty on to the manager; the employer's possession is de jure, the manager's de facto. It has long been established that to be the "actual "offender" within the meaning of the section a person must be capable of being guilty of the offence charged; i.e., the manager must have had the goods for sale in his very possession. Only his employers could have been in this position; for if the charge had referred to "selling," only they could have sold. In *Lester* v. *Balfour Williamson Ltd.*[10] it was held that certain representatives, who had handled the goods complained of, were not guilty of such an offence because they were acting as agents for their principal. The manager cannot have de facto possession if he is absent; actual possession is the essence of the charge. There is nothing unjust in the result, because the whole purpose of the Act is to place liability on employers.

---

[3] [1948] 1 K.B. 400; 64 T.L.R. 28; [1947] 2 All E.R. 881.

[4] [1928] 2 K.B. 629; 44 T.L.R. 820.

[5] [1891] 2 Q.B. 181; 7 T.L.R. 513.

[6] [1916] 2 K.B. 753.

[7] (1831) 2 B. & Ad. 817.

[8] (1930) 46 T.L.R. 151.

[9] [1928] 2 K.B. 629.

Sproule Bolton for the second respondent. The second respondent pleaded guilty before the justices and was surprised to be acquitted.

Thompson Q.C. replied.

Cur. adv. vult.

May 24. The following judgments were read.

LORD GODDARD C.J. This special case is stated by the justices for Royal Leamington Spa, before whom the appellants were summoned for three offences against section 4 (2) of the Sale of Food (Weights and Measures) Act, 1926, of being in possession for sale of pre-packed articles of food not made up in one of the quantities specified in the section. The first two informations referred to packets of lard and peas respectively which were alleged to be in the appellants' possession on October 3, 1956, while the third referred to a packet of butter on October 18. The appellants took the steps necessary to bring the second respondent, who is the manager of their shop at Leamington, before the court under section 12 (5), alleging that he was the actual offender and had committed the offence without any consent, connivance or wilful default on their part. Accordingly, they contended that, while they could be convicted of the offences, they were exempted from penalties and that the manager must be convicted and the penalties imposed on him.

The appellants are a limited company with shops in various localities. The first respondent, an inspector of weights and measures, on the dates mentioned in the informations weighed

---

[10] [1953] 2 Q.B. 168; [1953] 1 All E.R. 1146.

1957

MELIAS LTD.
v.
PRESTON.

Lord Goddard C.J.

the articles referred to and found certain deficiencies amounting to a few drachms in the packets he weighed. The second respondent had been in the appellants' service for 30 years and had been fully instructed in his duties and in the provisions of the various Acts relating to the sale of food. The justices were evidently satisfied that the deficiencies were caused without any fault on the part of the appellants. The packets of lard and peas had been weighed and prepared by the second respondent before he went on leave, but when the inspector visited the shop on October 3 he was absent on holiday. On October 18, when the packet of butter was weighed, the second respondent was present. He had not made up the packet, but we were told that he admitted it was his duty to check the weight and that he failed to do so. It seems that the second respondent had pleaded guilty to the three informations before the justices, but they held that the appellants were liable to be convicted and were not exempt from the penalties and, as we understand, they dismissed the summonses against the second respondent notwithstanding his pleas. The justices held that they were bound by the decision of this court in *A. Walkling Ltd.* v. *Robinson*,[1] and that the second respondent could not be held responsible as he was on leave on the date in question in the first two informations and that the case referred to also applied to the offence on October 18.

The first point for the decision of this court is what is meant by the words "the actual offender" in section 12 (5). This section is designed to afford a measure of relief to an employer who for statutory offences of this description is liable for the acts of his servants on the principle generally known as vicarious liability. The absence of mens rea in the matter has been held in a series of cases to afford no defence. This applies to a corporate body as to an individual: see *Pearks, Gunston & Tee Ltd.* v. *Ward*,[2] especially the judgment of Channell J. The Act which the court had there to consider was the Sale of Food and Drugs Act, 1875, and section 5 of that Act did permit a defendant charged under section 3, which dealt with adulteration, to prove as a defence that the adulteration was unknown to him and that he had acted with all due care; but that Act did not give a like defence to a charge under section 6 which dealt with sales to the prejudice of a purchaser. In the present Act subsection (2) of section 12 affords a defence where a deficiency in weight was due to the action of some person over whom the defendants had no control. Subsection (5) deals with the case of master and servant and, while not affording the former a defence, exempts him from penalties if he shows that he was in no way to blame and brings the actual offender before the court. The actual offender for this purpose must therefore be a servant of the employer. In my opinion the object of the subsection is twofold: first, to relieve from penalty, though not from conviction, a person who is not morally to blame and, secondly, to put pressure on the thoughtless or careless servant to do his whole duty and so protect the public by imposing the penalty on him. "Actual offender" accordingly, in my opinion, means the person whose act or default has brought about the particular circumstances that constitute the offence. The use of such a wide and non-technical expression indicates, in my opinion, that the court is not to be concerned with nice matters such as the distinction between possession in law and custody in fact or that in law the party to a sale is the owner of the shop or of the goods sold and not the shop assistant who sells on his behalf. It is the physical act that matters and this is clearly shown by *Hotchin* v. *Hindmarsh*.[3] Where the employer is a limited company it would seem that the case is a fortiori. A company can only sell by the hand of its servant and can only possess goods by their being in the possession of those employed to obtain and keep them.

---

[1] (1930) 46 T.L.R. 151.

[2] [1902] 2 K.B. 1; 18 T.L.R. 538.

I should feel no doubt on the matter were it not for the case which the magistrates felt bound them to decide as they did, *A. Walkling Ltd.* v. *Robinson*.[4] There Lord Hewart C.J. said in terms that the articles in that case were always in the possession of the employers and not of their manager, and it is at least open to question whether we ought to treat this observation or those of Avory J. in that case as merely obiter. It is, however, difficult to see what protection section 12 (5) can afford to any employer, let alone a company, for an offence against section 4 if that is right. It is unfortunate that *Hotchin* v. *Hindmarsh*[5] was not cited to the court, and had it been, while the actual decision might have been the same, the expressions relied on by the prosecution in this case as to the possession of the property would not, I think, have been used. *Hotchin's* case[5] shows that for the purpose of these statutes regard is to be had to the person who does the physical act. A sale or an exposure for sale may be effected, not only by the master, but by the servant who actually sells or is in actual charge of the article for sale, and, as Mathew J., in a short but pithy judgment, points out,[6] it would be an odd result if a guilty servant were to escape and his innocent employer alone convicted. As this case was not cited to the court in *A. Walkling Ltd.* v. *Robinson*,[7] in accordance with the principles laid down in *Young* v. *Bristol Aeroplane Co.*,[8] we are not bound to follow the expressions in *Walkling's* case.[9]

---

[3] [1891] 2 Q.B. 181; 7 T.L.R. 513.

[4] 46 T.L.R. 151.

[5] [1891] 2 Q.B. 181.

The question now arises whether any distinction is to be drawn between the offences alleged in the first two informations and the third. In the first two the packets had been prepared by the second respondent, but he was on leave on the day of the inspector's visit, while in the third he had not prepared the packet, but had not, as was his duty, checked it on his return from leave, and he was in the shop when the inspector called. As the manager for the company he was entrusted with the general management and, in my opinion, the lard and the peas were always in his possession for sale, though he was temporarily absent. To hold otherwise would, it seems to me, amount to saying that a manager for a company is not in possession of his employers' goods while he is out of the shop for a temporary purpose, or at night if he did not live on the premises. There is no finding that anyone else had been appointed to manage the shop while he was on leave, and to his credit be it said he did not take any such point, but admitted his responsibility. He was clearly in possession of the butter for sale when he returned from leave, and must take responsibility for that package whether he made it up or not, and again he does not seek to say otherwise.

The case must go back to the justices with a direction that while the conviction of the appellants stands they are exempt from penalties and they must convict the second respondent and impose the penalties on him. The first respondent must pay the costs of the appellants on this appeal and also of the second respondent, as he had always pleaded guilty and did not dispute his liability in this court. The costs below must be dealt with by the justices.

That we are differing from them is no reflection on the justices, for in view of the authority that was cited to them they could not have decided otherwise than they did.

[6] [1891] 2 Q.B. 181, 189.

[7] 46 T.L.R. 151.

[8] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293; [1946] A.C. 163.

[9] 46 T.L.R. 151.

HILBERY J. I have had the advantage of reading the judgment which my Lord has just delivered, and I agree with it, but I wish, however, to add my comment on the *Walkling* case.[10] It appears to me that in *Walkling's* case[10] it was not necessary to the decision of the court that they should express an opinion on the two questions asked by quarter sessions which led to the words used by Lord Hewart C.J., which have been regarded by the justices in the present case as a binding decision, that the manager of a shop cannot be a person in actual possession of the goods of his employer so as to be responsible under the provisions of section 12 (5).

In *A. Walkling Ltd.* v. *Robinson*[11] there had been three informations before the magistrate preferred by Robinson against Walkling Ltd. under section 6 (2) of the Sale of Food (Weights and Measures) Act, 1926, the first charging them with having in their possession for sale at North Circular Road, Hendon, loaves of bread which did not weigh one pound or an integral number of pounds; the second charging them with unlawfully selling a loaf of bread which did not weigh one pound or an integral number of pounds; the third charging them that at Folkestone House, Brent Street, Hendon, they had in their possession for sale loaves of bread which did not weigh one pound or an integral number of pounds.

Walkling Ltd. preferred three informations under section 12 (5) against F. A. Pearce, their employee, charging him with being guilty as the actual offender of each of the offences with which Walklings were charged as aforesaid.

Walklings were convicted by the magistrate on all three informations against them. The informations against Pearce were dismissed.

The question therefore which had arisen under section 12 (5) whether Walklings' servant Pearce was the person who had committed the offence in question was no longer open since he had been acquitted. None the less at quarter sessions, to which court Walklings appealed, Walklings still sought to set up, amongst other grounds of appeal, the assertion that they were not guilty of the offence, and that Pearce was the actual offender under section 12 (5) and had committed the offence in question. Quarter sessions asked the opinion of the King's Bench Division first on two questions: (1) Were the proceedings in respect of an alleged deficiency in weight? (2) Was there evidence upon which the court of quarter sessions could hold that the appellants had discharged the burden of proving (a) that the deficiency was due to a bona fide mistake or accident, or other cause beyond the appellants' control; and (b) that all reasonable precautions had been taken and all due diligence exercised by the appellants to prevent the occurrence of such deficiency?

---

[10] 46 T.L.R. 151.

[11] Ibid.

Lord Hewart C.J. and the two other judges were unanimously of opinion that there was no evidence on which the court of quarter sessions could hold that the appellants had discharged this burden set out in question (2), and that left the matter concluded because the conviction of Walklings would have to stand.

Quarter sessions had, however, added two further questions, asking: (3) Had the court of quarter sessions power to exempt the appellants from any penalty under section 12 (5) having regard to the fact that Pearce had been acquitted? (4) On the facts proved or admitted was Pearce the actual offender within the meaning of section 12 (5) of the said statute (a) in the case of the loaves on the roundsman's barrow; (b) in the case of the loaves at the shop?

As the court pointed out, it was not open to quarter sessions to go into the matters which were the subject of these two questions.

Lord Hewart C.J. said in his judgment[12]: "Before the justices "Pearce was acquitted, and I do not think that at quarter "sessions it was open to the appellants to allege or to argue "that Pearce was wrongly acquitted. In order that they might "avail themselves of section 12 (5), it was necessary for them to "say that notwithstanding the acquittal at petty sessions, never-"theless in truth and in fact the actual offender was Pearce, "and it was he who had committed the offence in question. It "seems to me that it was not open to the appellants to attempt "to prove that proposition," and then, unfortunately, the Lord Chief Justice added the words "and even if it had been, upon "these materials they could not prove it." Immediately thereafter, notwithstanding what he had said he did, however, offer an answer to the last question, saying that so far as the loaves on the barrow were concerned, the facts had shown that Pearce was not the actual offender, and so far as the loaves in the shop were concerned, true, he was the manager of the shop, but he was no more in possession of these loaves than was any other person employed upon those premises. The possession of the loaves in the shop was the possession of Walkling Ltd., the appellants.

---

[12] 46 T.L.R. 151, 156.

These observations were not necessary in the case. The question need not have been answered because Pearce had been acquitted, and it seems to me, therefore, that there is something to be said for regarding them as obiter.

If the court there did intend to say that because Pearce was the manager and an employee, he could not be in possession of the loaves at the shop for sale, then they were saying something which is quite contrary to the whole purpose and effect of section 12 (5), which is designed to give relief against the penalty where the master is vicariously responsible for what are in truth the acts of his employee.

If *Walkling's* case [13] decided that the manager of the shop could not be the actual offender because the loaves in that case were no more in his possession than that of any other person employed upon these premises, it would be tantamount to deciding that an employer could never get the benefit of section 12 (5).

I would regard the observations of the court in that case upon this topic as not necessary for the decision and as made per incuriam, the decision in *Hotchin* v. *Hindmarsh* [14] not having been cited to the court, the court's attention not having been called to the principles applied in that case.

DEVLIN J. I agree.

Appeal allowed.

Solicitors: *Arthur Taylor & Co., for Mace & Jones, Liverpool; Sharpe, Pritchard & Co. for R. M. Willis, Shire Hall, Warwick; Thompson, Quarrell & Megaw for Blythe, Owen, George & Co., Leamington Spa.*

---

[13] 46 T.L.R. 151.

[14] [1891] 2 Q.B. 181.

ARMSTRONG *v.* CLARK.

1957
Jan. 30.

Lord Goddard C.J., Cassels and Lynskey JJ.

Road Traffic—Drug, driving under influence of—Meaning of "drug"—Insulin—Whether a drug—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 15 (1).

On August 13, 1956, the defendant, who had suffered for some 12 years from diabetes, after taking by injection his usual and prescribed quantity of insulin and having eaten a regulated meal, drove his motor-car a distance of some two miles to a cinema. About two-and-a-half hours later the defendant started to leave the cinema and remembered no more. He in fact got into his motor-car and drove it a distance of some four miles before it left the road. He was found on the same night sitting rigidly at the wheel of the motor-car in a semi-comatose condition and on being examined at a nearby hospital was found to be in a hypoglycaemic coma due to the overaction of the insulin injection he had previously taken. On a charge of driving when under the influence of a drug to such an extent as to be incapable of having proper control of the vehicle contrary to section 15 (1) of the Road Traffic Act, 1930 [1]:—

Held, that insulin, being a medicine, was a drug for the purposes of section 15 (1) and, therefore, that the taking of insulin by the defendant was, in the circumstances, such as to make him guilty of the offence charged.

Per Lord Goddard C.J. *Semble*, "drink" means alcoholic drink.

Thomson v. *Knights* [1947] K.B. 336; 63 T.L.R. 38; [1947] 1 All E.R. 112 explained.

CASE STATED by the Chester Justices sitting at Wilmslow.

The defendant, Jack William Clark, was a registered pharmaceutical chemist and had suffered from diabetes for some 12 years. On August 13, 1956, at about 6.10 p.m., after taking by injection his usual and prescribed quantity of 18 units of soluble insulin B.D. and consuming a regulated meal, he drove his motor-car from his residence at Alderley Edge, Cheshire, to the Rex cinema at Wilmslow, a distance of about two miles, arriving at about 6.40 p.m. At about 9 p.m. the defendant, being unaccompanied, started to leave the cinema and remembered no more than that he walked down the steps at the cinema entrance. He did in fact get into his motor-car, which he drove from Wilmslow to Alderley Edge and then along a road known as Macclesfield Road, Over Alderley. At a point approximately four miles from the Rex cinema his car left the road travelling a distance of some 200 yards until it stopped in gear. The defendant was discovered by the landowner at 10.15 p.m. on the same night sitting rigidly at the wheel of his motor-car in a semi-comatose state. He was taken to Macclesfield General Infirmary, examined at 11.35 p.m. and was found to be in a hypoglycaemic coma due to overaction of the insulin injection he had previously taken.

On August 28, 1956, the prosecutor, William Armstrong, inspector of police at Wilmslow, preferred an information against the defendant that on August 13, 1956, he did drive a motor-car on Macclesfield Road when under the influence of a drug to such an extent as to be incapable of having proper control of the vehicle contrary to section 15 (1) of the Road Traffic Act, 1930.[1]

It was contended by the prosecutor, inter alia, that whilst driving as aforesaid the defendant was under the influence of a drug, namely, insulin, to such an extent as to be incapable of having proper control over his vehicle.

It was contended by the defendant that on the medical evidence called by both sides the taking of insulin by the defendant was not the taking of a drug but the replacement of an essential hormone of which his body was deficient and that accordingly he was not under the influence of a drug within the meaning or contemplation of section 15 (1) of the Road Traffic Act, 1930.

The justices dismissed the information and stated a case for the opinion of the court.

Roger Parker and *F. P. Neill* for the prosecutor. Insulin is a drug within the meaning of section 15 (1) of the Road Traffic Act, 1930. The Act applies whether a person is incapacitated by taking intoxicating drink or by the application of some substance that affects his mental or physical capacity. If there is overaction of an insulin injection the mental or physical capacity of the taker is impaired, and for the purposes of the Act it makes no difference that the drug is taken for a medicinal purpose. This Act is intended to prevent persons from using the roads whose faculties are impaired by the taking of drink or drugs.

Gerald Howard Q.C. and *J. W. Da Cunha* for the defendant. In *Thomson* v. *Knights*[2] Lord Goddard C.J. said[3] that the Act was intending to provide that a man in charge of a car in a self-induced state of incapacity was committing an offence. He made no reference to a state of incapacity that was not self-induced, and here the defendant's incapacity was clearly not self-induced, the overaction of the insulin injection being entirely by chance. A state of incapacity which was not self-induced was not covered by section 15 (1) of the Act. If that is wrong, then it would be true to say that a diabetic who drank a glass of lemonade which, unknown to him, contained sugar, and then went into a coma, was committing an offence under the Act. In that context lemonade would rank as "drink" within the meaning of the section, and that is clearly absurd.

---

[1] Road Traffic Act, 1930, s. 15: "(1) Any person who when driving or "attempting to drive, or when in "charge of, a motor vehicle on a road "or other public place is under the "influence of drink or a drug to such "an extent as to be incapable of "having proper control of the "vehicle, shall be liable [to a "penalty]."

[2] [1947] K.B. 336; 63 T.L.R. 38; [1947] 1 All E.R. 112.

[3] [1947] K.B. 336, 338.

Lord Goddard C.J. stated the facts and continued: The only question which the justices ask us is whether the taking of insulin by the defendant was to be regarded as taking a drug which would make him liable to be found guilty of an offence under section 15 (1) of the Road Traffic Act, 1930. In my opinion, for the purposes of this Act, of course insulin is a drug. In my view a drug means what I might for convenience call a medicament or medicine, something given to cure, alleviate or assist an ailing body. The definitions given in the Oxford Dictionary are very comprehensive, but I do not think the ordinary man would have any doubt that a person taking insulin is taking what in ordinary parlance would be called a drug in the sense of a medicine. The statute, then, is perfectly clear; section 15 (1) provides: "Any person who "when driving or attempting to drive, or when in charge of, a "motor vehicle on a road or other public place is under the "influence of drink or a drug to such an extent as to be incapable "of having proper control of the vehicle, shall be liable", to a penalty. The penalty is entirely at the discretion of the bench.

In *Thomson* v. *Knights* [1] I was talking about a self-induced state of incapacity, and I was distinguishing where the state of incapacity is caused by something the man does from something he does not do which is caused by a drug or heart attack or some illness. I went on to say that the offence is being in charge of the car when in this particular state of incapacity, and I adhere to that view, providing the incapacity is caused by drink or a drug. I do not think it is necessary to consider the ingenious point Mr. Howard took as to whether a non-alcoholic beverage is drink within the meaning of the Act. If that were so, I should be inclined to apply the dictum of Martin B. where the bailiff was sworn to keep the jury without meat or drink, or any light but candelight, and a juryman asked if he might have a glass of water. Martin B. said: "Well, it is certainly "not meat and I should not call it drink. He can have it." I think "drink" means alcoholic drink. It is impossible to say that the defendant was not under the influence of a drug, and, therefore, I think the case must go back with a direction that insulin is a drug for the purposes of this section. The justices and everyone must remember that this section was designed for the protection of the public, and if people happen to be in a condition of health that renders them subject to comas or take remedies which may send them into a coma, they must not drive because they are a danger to the rest of Her Majesty's subjects. It is enough to say that we send this case back to the justices answering the question by saying that the taking of insulin in such circumstances as occurred would make the defendant liable to be found guilty of the offence, and he did commit the offence under section 15 (1) of the Act.

---

[1] [1947] K.B. 336; 63 T.L.R. 38; [1947] 1 All E.R. 112.

Cassels J. I agree. I am of the view that section 15 was deliberately worded in the way in which it appears. I would define the word " drug " as being a substance used as a medicine. The mischief which is sought to be provided against by this section is anyone going on to a road with a dangerous thing like a motor-vehicle while being under the influence of a drug to such an extent as to be incapable of having proper control of that vehicle. The statute is provided to make it an offence. It is little consolation to anybody who is injured by a person driving when under the influence of a drug to be told: " After all, I " was under the influence of a drug and therefore it was not my " fault." It may well arise in some future case, and will then have to be decided, whether anyone was negligent if he drove whilst under the influence of a drug.

In my opinion this case should go back to the justices in the manner suggested by my Lord, and I agree with the course proposed.

Lynskey J. I agree. Section 15 (1) was passed for the purpose of protecting the public using the roadways. In my view, in order to succeed the prosecution have to prove two things, first, that the person accused was either driving or attempting to drive or in charge of a motor vehicle on a road or public place. Having proved that, they have to prove that he was under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle. Having proved those two things, the prosecution have proved the case for which the section provides. It is clear that Parliament in passing this particular section was concerned about persons driving on the public roads in a state of being either under the influence of drugs or drink, because subsection (2) of

1957

ARMSTRONG
v.
CLARK.

Lynskey J.

the same section makes it compulsory for the justices who convict of this particular offence to disqualify the person from driving for the next 12 months unless there are special circumstances. The section was intended to keep off the roads, so far as it could, people attempting to take control or having control while not having the power to do so through drink or drugs. I am satisfied that on the ordinary definition insulin would be treated as and is a drug. In those circumstances, I agree with what my brethren have said.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co. for Hugh Carswell, Chester; Charles Russell & Co. for Skelton & Co., Manchester.*

P. P.

C. C. A.

REGINA *v.* CUNNINGHAM.

1957
May 20, 27.

Byrne, Slade and Barry JJ.

Criminal Law — Mens rea — "Maliciously" — Causing coal gas to be taken so as to endanger life—Whether "wickedness" equivalent to "malice" in statutory crime—Whether "maliciously" postulates foresight of consequence—Offences against the Person Act, 1861 (24 & 25 *Vict.* c. 100), *s.* 23.

The appellant stole a gas meter and its contents from the cellar of a house and in so doing fractured a gas pipe. Coal gas escaped, percolated through the cellar wall to the adjoining house, and entered a bedroom with the result that W., who was asleep, inhaled a considerable quantity of the gas. The appellant ~~was charged~~ was charged on an indictment preferred under the Offences against the Person Act, 1861, s. 23,[1] with unlawfully and maliciously causing W. to take a noxious thing, namely, coal gas, so as thereby to endanger her life. The judge directed the jury that "maliciously" meant "wickedly"—doing "something which he has no business to do "and perfectly well knows it." On an appeal against conviction:—

Held, allowing the appeal, that the word "maliciously" in a statutory crime postulated foresight of consequence, and that for an offence to be committed under section 23 it was necessary for the

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

---

[1] Offences against the Person Act, 1861, s. 23: "Whosoever shall un-"lawfully and maliciously administer "to or cause to be administered to "or taken by any other person any "poison or other destructive or "noxious thing, so as thereby to "endanger the life of such person, "or so as thereby to inflict upon such "person any grievous bodily harm, "shall be guilty of felony . . ."

accused person either to intend to do the particular type of harm in fact done or, foreseeing that such harm might be done, for him recklessly to take the risk of it.

Reg. v. *Pembliton* (1874) L.R. 2 C.C.R. 119 applied.

APPEAL against conviction.

The appellant, Roy Cunningham, was charged at Leeds Assizes on two indictments. To the first indictment, which contained two counts of larceny of a gas meter and its contents contrary to sections 8 and 2 of the Larceny Act, 1916, he pleaded Guilty, and there was no appeal in that respect. The second indictment, framed under section 23 of the Offences against the Person Act, 1861, charged that he unlawfully and maliciously caused to be taken by Sarah Wade a certain noxious thing, namely, coal gas, so as thereby to endanger her life, and to that he pleaded Not Guilty. Oliver J. directed the jury that for the purpose of the section "maliciously" meant "wickedly" doing "something which he has no business to do and perfectly well "knows it. 'Wicked' is as good a definition as any other which "you would get." The appellant was convicted, and appealed on the ground of misdirection of the jury.

The facts are fully set out in the judgment of Byrne J.

S. E. Brodie for the appellant. The prosecution must prove on a charge brought under section 23 of the Offences against the Person Act, 1861, that the accused acted maliciously and unlawfully. Malice imports mens rea. The nature of the mens rea required is that the accused must either intend to do the harm in fact done or he must foresee that the actual harm done might occur as a result of his actions but nevertheless continues recklessly, not caring whether it be done or not. There is no authority decided on the point under section 23, but *Reg.* v. *Pembliton,*[2] a case under section 51 of the Malicious Damage Act, 1861, and which concerned damage to property, supports the contention: see *per* Lord Coleridge C.J.[3] and Blackburn J.[3] *Pembliton's* case[4] was considered in *Reg.* v. *Latimer,*[5] a decision under section 20 of the Offences against the Person Act, 1861, and that case is authority for the proposition that the definition of "malice" contended for applies equally to offences against the person as it does to offences against property. Oliver J.'s direction to the jury that "malice" meant "wickedness" is insufficient. He was also wrong in refusing to withdraw the case from the jury at the end of the prosecution evidence.

---

[2] (1874) L.R. 2 C.C.R. 119.

[3] Ibid. 122.

[4] L.R. 2 C.C.R. 119.

[5] (1886) 17 Q.B.D. 359; 2 T.L.R. 626; 55 L.J.M.C. 135.

J. S. Snowden, for the Crown, was not called upon to argue whether the case should have been withdrawn from the jury. He conceded that it would be difficult to seek to uphold the direction. [Reference was also made to *Reg.* v. *Faulkner*[6] and *Reg.* v. *Martin.*[7]]

Cur. adv. vult.

May 27. BYRNE J. read the following judgment. The appellant was convicted at Leeds Assizes upon an indictment framed under section 23 of the Offences against the Person Act, 1861, which charged that he unlawfully and maliciously caused to be taken by Sarah Wade a certain noxious thing, namely, coal gas, so as thereby to endanger the life of the said Sarah Wade.

The facts were that the appellant was engaged to be married and his prospective mother-in-law was the tenant of a house, No. 7A, Bakes Street, Bradford, which was unoccupied, but which was to be occupied by the appellant after his marriage. Mrs. Wade and her husband, an elderly couple, lived in the house next door. At one time the two houses had been one, but when the building was converted into two houses a wall had been erected to divide the cellars of the two houses, and that wall was composed of rubble loosely cemented.

On the evening of January 17, 1957, the appellant went to the cellar of No. 7A, Bakes Street, wrenched the gas meter from the gas pipes and stole it, together with its contents, and in a second indictment he was charged with the larceny of the gas meter and its contents. To that indictment he pleaded guilty and was sentenced to six months' imprisonment. In respect of that matter he does not appeal.

The facts were not really in dispute, and in a statement to a police officer the appellant said: "All right, I will tell you. I "was short of money, I had been off work for three days, I got "eight shillings from the gas meter. I tore it off the wall and "threw it away." Although there was a stop tap within two feet of the meter the appellant did not turn off the gas, with the result that a very considerable volume of gas escaped, some of which seeped through the wall of the cellar and partially asphyxiated Mrs. Wade, who was asleep in her bedroom next door, with the result that her life was endangered.

---

[6] (1877) 13 Cox C.C. 550.

[7] (1881) 8 Q.B.D. 54; 14 Cox C.C. 633.

At the close of the case for the prosecution, Mr. Brodie, who appeared for the appellant at the trial and who has appeared for him again in this court, submitted that there was no case to go to the jury, but the judge, quite rightly in our opinion, rejected this submission. The appellant did not give evidence.

The act of the appellant was clearly unlawful and therefore the real question for the jury was whether it was also malicious within the meaning of section 23 of the Offences against the Person Act, 1861.

Before this court Mr. Brodie has taken three points, all dependent upon the construction of that section. Section 23 provides: "Whosoever shall unlawfully and maliciously administer "to or cause to be administered to or taken by any other person "any poison or other destructive or noxious thing, so as thereby "to endanger the life of such person, or so as thereby to inflict "upon such person any grievous bodily harm, shall be guilty "of felony . . ."

Mr. Brodie argued, first, that mens rea of some kind is necessary. Secondly, that the nature of the mens rea required is that the appellant must intend to do the particular kind of harm that was done, or, alternatively, that he must foresee that that harm may occur yet nevertheless continue recklessly to do the act. Thirdly, that the judge misdirected the jury as to the meaning of the word "maliciously." He cited the following cases: *Reg.* v. *Pembliton*,[1] *Reg.* v. *Latimer*[2] and *Reg.* v. *Faulkner*.[3] In reply, Mr. Snowden, on behalf of the Crown, cited *Reg.* v. *Martin*.[4]

We have considered those cases, and we have also considered, in the light of those cases, the following principle which was propounded by the late Professor C. S. Kenny in the first edition of his Outlines of Criminal Law published in 1902 and repeated at p. 186 of the 16th edition edited by Mr. J. W. Cecil Turner and published in 1952: "In any statutory definition of a crime, "malice must be taken not in the old vague sense of wickedness "in general but as requiring either (1) An actual intention to do "the particular kind of harm that in fact was done; or (2) reck"lessness as to whether such harm should occur or not (i.e., the "accused has foreseen that the particular kind of harm might "be done and yet has gone on to take the risk of it). It is "neither limited to nor does it indeed require any ill will towards

---

[1] (1874) L.R. 2 C.C.R. 119.

[2] (1886) 17 Q.B.D. 359; 2 T.L.R. 626; 55 L.J.M.C. 135.

[3] (1877) 13 Cox C.C. 550.

[4] (1881) 8 Q.B.D. 54; 14 Cox C.C. 633.

"the person injured." The same principle is repeated by Mr. Turner in his 10th edition of Russell on Crime at p. 1592.

We think that this is an accurate statement of the law. It derives some support from the judgments of Lord Coleridge C.J. and Blackburn J. in *Pembliton's* case.[5] In our opinion the word "maliciously" in a statutory crime postulates foresight of consequence.

In his summing-up Oliver J. directed the jury as follows: "You will observe that there is nothing there about 'with "'intention that that person should take it.' He has not got "to intend that it should be taken; it is sufficient that by his "unlawful and malicious act he causes it to be taken. What "you have to decide here, then, is whether, when he loosed "that frightful cloud of coal gas into the house which he "shared with this old lady, he caused her to take it by his "unlawful and malicious action. 'Unlawful' does not need any "definition. It is something forbidden by law. What about "'malicious'? 'Malicious' for this purpose means wicked— "something which he has no business to do and perfectly well "knows it. 'Wicked' is as good a definition as any other which "you would get."

"The facts which face you (and they are uncontradicted and "undisputed; the prisoner has not gone into the box to seek to "give any particular explanation) are these. Living in the "house, which was now two houses but which had once been "one and had been rather roughly divided, the prisoner quite "deliberately, intending to steal the money that was in the "meter . . . broke the gas meter away from the supply pipes "and thus released the mains supply of gas at large into that "house. When he did that he knew that this old lady and her "husband were living next door to him. The gas meter was in "a cellar. The wall which divided his cellar from the cellar next "door was a kind of honeycomb wall through which gas could "very well go, so that when he loosed that cloud of gas into "that place he must have known perfectly well that gas would "percolate all over the house. If it were part of this offence— "which it is not—that he intended to poison the old lady, I "should have left it to you to decide, and I should have told "you that there was evidence on which you could find that he "intended that, since he did an action which he must have "known would result in that. As I have already told you, it is

---

[5] L.R. 2 C.C.R. 119, 122.

"not necessary to prove that he intended to do it; it is quite "enough that what he did was done unlawfully and maliciously."

With the utmost respect to the learned judge, we think it is incorrect to say that the word "malicious" in a statutory offence merely means wicked. We think the judge was, in effect, telling the jury that if they were satisfied that the appellant acted wickedly—and he had clearly acted wickedly in stealing the gas meter and its contents—they ought to find that he had acted maliciously in causing the gas to be taken by Mrs. Wade so as thereby to endanger her life.

In our view it should have been left to the jury to decide whether, even if the appellant did not intend the injury to Mrs. Wade, he foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it. We are unable to say that a reasonable jury, properly directed as to the meaning of the word "maliciously" in the context of section 23, would without doubt have convicted.

In these circumstances this court has no alternative but to allow the appeal and quash the conviction.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

UNIVERSAL CARGO CARRIERS CORPORATION *v.* CITATI.

1957
Feb. 14, 15, 18, 19, 20, 21; *Mar.* 12.

Devlin J.

Shipping—Charterparty—Voyage—Anticipatory breach—Renunciation or impossibility — Failure to load — Inability of charterer to nominate shipper, or berth, or to provide cargo—Whether breaches of condition or warranty — Charterparty cancelled by shipowners before expiry of lay days — Whether justified — Delay justifying rescission—Proper test to be applied.

Contract—Repudiation—Anticipatory breach—Nature of.

Arbitration — Case stated — Form — Interim award—Undesirability of setting out evidence. Arbitration—Case stated—New point of law —Court's right to consider—Question of law left in general form. Arbitration—Case stated—Remission to arbitrator—Relevant facts

1957

Universal Cargo Carriers Corporation *v.* Citati.

not found—Duty of party to apply for remission—Court's power to remit—R.S.C., Ord. 64, *r.* 14—*Arbitration Act,* 1950 (14 *Geo.* 6, *c.* 27), *s.* 22.

Commercial Court—Value of—Superiority to arbitration—Questions of mixed fact and law.

Contract — Frustration — Fact or law — Period of delay—Arbitration. Fact or law.

By a voyage charterparty dated June 30, 1951, the *Catherine D. Goulandris* was chartered to load at Basrah a quantity of scrap iron for carriage to Buenos Aires. By the charterparty it was provided that "cargo to be brought alongside in such a manner as "to enable the vessel . . . to load . . . the cargo at the rate of 1,000 "tons per weather working day. . . . Time to commence 1 p.m. "if notice of readiness is given before noon and at 6 a.m. next "working day if notice given . . . after noon . . . notice of readiness "to be given to shipper. . . . Time lost in waiting for berth to "count as loading time." The ship arrived at Basrah on July 12, but the charterer failed to nominate an effective shipper so she was sent to the buoys where she remained until July 18. On July 18, three days before the lay days were due to expire under the charterparty, no cargo having been provided, the owners cancelled the charter, rechartered the ship to another charterer and ordered her away from Basrah. She sailed on July 23, the charterer's efforts to find a cargo having failed, and the owners having refused to accede to his demand to detain the ship.

The owners claimed damages before an arbitrator for breach of the charterparty. They justified the cancellation of the charter on the grounds (1) that the breaches alleged, namely, in failing to nominate a shipper or a berth or to provide cargo, were breaches of conditions, and (2) that the charterer's conduct amounted to a repudiation of the charterparty. The charterer denied any breach and counterclaimed for damages for wrongful repudiation by the owners.

The arbitrator found that the owners should on July 18 have inferred from the charterer's conduct: (1) that he was always willing to perform if he could; (2) that he could not have performed by the end of the lay days or within a reasonable time thereafter; and (3) that he could have performed before the delay became so long as to frustrate; but (4) that, in the light of later events, the owners would have concluded that the charterer would not be able to perform before the delay had become so long as to frustrate.

The arbitrator held that the charterer had committed a breach of the charterparty by failing to nominate a shipper, but that it was a breach of warranty entitling the owners only to damages; but that he had, by his conduct, evinced an intention not to perform the charterparty. He made an interim award on liability in favour of the owners subject to the decision of the court on the question whether on the facts found and on the true construction of the charterparty the owners were entitled to treat the charterparty as discharged:—

Held, (1) that where no time was stipulated, the preliminary obligations under the charterparty had to be performed in sufficient time to allow the main obligation of loading to be completed within the prescribed time and as, on the facts found, the loading could not have been completed in the lay time remaining after July 18, by that date the time for nominating a berth and providing a cargo had expired and the charterer was in breach of both those terms; and in those circumstances it was not necessary to decide whether the nomination of a shipper was a term of the charterparty. Moreover, the charterer, by putting it out of his power to load the cargo within the lay time prescribed, had committed a further breach of the charterparty; but that none of the breaches committed were breaches of condition and therefore the owners were not ipso facto entitled to rescind.

Vergottis v. *Wm. Cory & Son Ltd.* [1926] 2 K.B. 344 and *Chandris* v. *Isbrandtsen-Moller Co.* [1951] 1 K.B. 240; 66 T.L.R. (Pt. 1) 971; [1950] 1 All E.R. 768 applied.

(2) That the proper test to apply in order to decide whether delay in fulfilling obligations under a contract was so grave as to entitle the aggrieved party to rescind was whether that delay was such as to frustrate the commercial purpose of the venture; that "reasonable time" could only be accepted as the test where the period regarded as reasonable time was the same as the period necessary to frustrate; and therefore, as the arbitrator had based his award in favour of the owners on the finding that the charterer would be unable to perform within a reasonable time after the expiry of the lay days (which was less than the period required to frustrate) he had applied a test as to the delay necessary to amount to repudiation which was erroneous in law.

Tarrabochia v. *Hickie* (1856) 1 H. & N. 183; *Stanton* v. *Richardson* (1872) L.R. 7 C.P. 421; dictum of Scrutton L.J. in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.* [1917] 2 K.B. 193, 201 applied.

Geipel v. *Smith* (1872) L.R. 7 Q.B. 404 considered.

(3) That, while the application of the doctrine of frustration was a matter of law, the assessment by the arbitrator of the period of delay sufficient to constitute frustration was a question of fact, and could be attacked only if he had applied some wrong principle of law (which he had not).

(4) That an anticipatory breach of contract (on which the owners must rely) was (1) renunciation by a party of his liabilities under it, or (2) impossibility of performance, including when by his own act or default circumstances arose which rendered him unable to perform his side of the contract or some essential part of it. "Anticipatory breach" covered all breaches which were bound to happen.

Dictum of Lord Porter in *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 397; 58 T.L.R. 169; [1942] 1 All E.R. 337 and Smith's Leading Cases (1929), 13th ed., vol. 2, p. 40, applied.

(5) That as conduct could only be interpreted in the light of events known to the interpreter at the time, the owners had failed

to establish that the arbitrator should properly have taken after-events into account in determining the conduct of the charterer. Accordingly, the owners' claim on renunciation failed.

Forslind v. *Bechely-Crundall*, 1922 S.C.(H.L.) 173 considered.

But (6) that the owners were entitled to succeed if they could prove that the charterer had, on July 18, 1951, become wholly and finally disabled from finding a cargo before the delay frustrated the venture; it was immaterial whether the disablement was deliberate or not; but the determination of inability must be made in the light of all the events, occurring before and after the critical date, which were put in evidence at the trial.

Dicta of Lord Sumner in *British & Beningtons Ltd.* v. *N. W. Cachar Tea Co. Ltd.* [1923] A.C. 48, 71 applied.

Geipel v. *Smith*, L.R. 7 Q.B. 404 and *Thorpe* v. *Fasey* [1949] Ch. 649; 65 T.L.R. 561; [1949] 2 All E.R. 393 considered.

(7) That on this form of award, leaving the question of law in general form, a party was entitled to argue any point of law arising on the facts found.

(8) That it was the duty of a party to satisfy himself when he got the case stated that the relevant facts were found, and, if not, apply for remission under R.S.C., Ord. 64, r. 14, within the six weeks allowed.

(9) That there was no clear finding on which the question could be argued on the case as it stood as the award was directed to renunciation and not impossibility in fact and therefore, as the owners ought not to be debarred from taking the point and could now be allowed to do so without injustice to the charterer, the case would be remitted to the arbitrator for a further finding on the question whether the charterer was, on July 18, 1951, willing and able to perform the charterparty within such time as would not have frustrated the commercial object of the venture.

SPECIAL CASE stated by an arbitrator (Mr. Eustace Roskill Q.C.) in form of interim award.

By a charterparty in the Gencon form signed in London on June 30, 1951, by the duly authorized agents of Universal Cargo Carriers Corporation (a corporation registered in the United States of America), owners of the ss. *Catherine D. Goulandris*, and Pedro Citati (a merchant carrying on business in Buenos Aires), the latter (hereinafter referred to as "the charterer") chartered the vessel (expected ready to load at Basrah on July 6, 1951), to load a cargo of scrap iron at Basrah for carriage to Buenos Aires at U.S.$28 per ton. The charterparty provided, inter alia:

"5. Cargo to be brought alongside in such a manner as to "enable the vessel to take the goods with her own tackle and to "load and stow the goods free of expense to vessel the cargo at "the rate of 1,000 tons per weather working day, Sundays and "holidays excepted unless used. . . . Time to commence 1 p.m. "if notice of readiness is given before noon and at 6 a.m. next "working day if notice given during office hours after noon. "The notice to be given to the shippers. . . . Time lost in "waiting for berth to count as loading time. . . . 7. Demurrage "to be at the rate of $1,000 per day. . . . 11. Lay days not to "commence before July 5, 1951, and should the vessel not be "ready to load (whether in berth or not) on or before July 25, "1951, the charterers to have the option of cancelling the con-"tract. . . ." It was also provided that any dispute should be referred to arbitration in London.

Disputes having arisen under the charterparty, Mr. Eustace Roskill Q.C. was appointed as sole arbitrator, the hearing taking place in London on February 27, 28, 29 and 30, 1956.

The owners claimed damages exceeding $100,000 from the charterer for breach of the charterparty. The charterer counterclaimed for the sterling equivalent of $5,000 which he had paid to the owners as advance of freight payable under the charterparty under a collateral agreement.

The issue argued before the arbitrator was whether the owners were justified in treating the charterparty as at an end on July 18, 1951, when they rechartered the vessel to charterers other than the charterer. The owners maintained that they were justified in so acting by reason of the charterer's alleged breach of the charterparty, and that they were also entitled to damages for that breach. The charterer maintained that the owners were not justified in rechartering the vessel on July 18, 1951.

The following statement of facts is taken from the judgment and is a summary of the main facts set out in the case: On June 30, 1951, the charterer entered into a charterparty with the owners whereunder the *Catherine D. Goulandris*, expected ready to load at Basrah about July 6 (she, in fact, arrived on July 12), was to proceed to Basrah and there load 6,000 tons of scrap iron which she was to carry to Buenos Aires. The charterer, who carried on business at Buenos Aires, intended to use the vessel to import from Basrah this quantity of scrap iron which he had bought from a merchant called Haddad, who appeared to carry on business at Baghdad and was intended to be the shipper of the cargo at Basrah. It appeared that Haddad in turn had bought from a merchant called Chbib of Beirut, and Chbib from a merchant called Vassos, who carried on business in Baghdad and was known to be the main shipper of the occasional cargoes of scrap that were exported from Basrah. At or shortly after the time that the charterparty was executed the charterer nominated Haddad as the shipper, to whom notice of readiness was to be given under the charter, but gave his address as Basrah and not as Baghdad. Gray, who was the ship's agent at Basrah, ascertaining that there was no such person as Haddad there, and getting his address in Baghdad, cabled to him on July 4 asking for the name of his agent at Basrah, but he never received any reply. Gray appeared to have heard privately on this date that a cargo of scrap iron did exist in Basrah, but was located some distance from the loading wharf, and that it would be ready for shipment about July 15. On July 7 Gray cabled once more to Haddad, and on July 8 sent him a registered letter. Again he received no reply, and inquiries he made on his own did not enable him to find out whether Haddad had any local agent in Basrah or whether he had begun to make local arrangements. Gray kept his principals informed of the position, and they passed the information on to the charterer, pointing out the urgency of the matter.

During this time Haddad was in fact in Washington, and, on his instructions, on July 10 a cable was sent to Gray saying that shippers through Beirut would contact him. This was presumably a reference to Chbib. On July 11 Gray received a cable saying that, as the charterer was still without "contact" with the shipper, he would order the vessel to the buoys at Basrah to await orders. On the same day Gray got another cable, as the result of a further conversation with Haddad, instructing him to contact Vassos, and on the same day another cable from the charterer or his agents instructing him to contact Chbib. On July 12 Gray cabled Vassos in Baghdad but got no reply, and on the afternoon of that day the vessel arrived at Basrah, reaching the buoys at 2.34 p.m. Gray, who was uncertain as to whom he was authorized to deal with as shipper, cabled for clarification and got an answer on the instructions of the charterer that he was to accept Vassos or his nominees as shipper. Accordingly, on the same day he sent Vassos a registered letter asking for information, and on July 15 Vassos cabled back: "Regret I have no connexion with steamer in question."

The reason for this situation was not known to Gray or to the owners. But the facts were that the price of scrap iron had risen very rapidly, and Vassos, who was the ultimate seller and who alone owned or controlled sufficient scrap iron in Iraq to supply the charterer's needs, was seeking to free himself from the bargain by claiming that the credit under which he was to receive payment from Chbib had not been opened in time.

Gray did not know what was going on behind the scenes; but on July 17 he did know that Vassos had again confirmed emphatically that he had no interest in the *Catherine D. Goulandris* charter, and that there were 6,000 tons of scrap iron in the Basrah area for which no shipping arrangements had yet been made, but that shippers closely associated with Vassos were believed to be interested in shipping 6,000 tons to the United Kingdom. The vessel had now been in Basrah at the buoys for five days, and it must have been plain to the owners that no cargo would be loaded for some time, if at all. On the following day, July 18, the owners chartered the vessel to load another cargo from an Indian port and carry it to Mobile, Alabama. Both sides were agreed that July 18 was the crucial date and that on that date the owners, rightly or wrongly, threw up the charter.

Thereafter, the charterer, who had been told that the owners were ordering the vessel away, continued with his endeavours to arrange a shipment before she actually sailed, and on July 19 cabled Gray demanding that he should hold the vessel and contact Chbib in Beirut for loading instructions. On July 20 the charterer, through attorneys in New York, wrote to the owners threatening action. The owners, however, refused to detain the vessel, and she left Basrah on July 23. On July 24 the charterer obtained a court order in New York restraining the owners from operating the vessel otherwise than under the charterparty. On July 27 that order was discharged by consent, the parties agreeing without prejudice to their respective contentions that the owners would give the charterer the option (to be exercised by midnight on August 15), to charter a substitute vessel to load scrap iron at Basrah on the same terms, provided that the charterer first satisfied Gray that he had a cargo ready. The charterer never exercised that option and, if and in so far as he made any further efforts to procure a cargo, they were unsuccessful.

The owners claimed that they were entitled (a) to act as they did when, on July 18, 1951, they rechartered the vessel, and (b) to recover damages for the charterer's alleged breach of the charterparty. They contended (1) that the charterer was guilty of a breach of condition or of a fundamental term of the charterparty in failing to nominate a shipper ready, willing and

1957

UNIVERSAL CARGO CARRIERS CORPORATION v. CITATI.

able to accept notice of readiness under clause 5 of the charterparty, and that by reason of that breach of condition they (the owners) were entitled to treat the charterparty as at an end, as they in fact did on July 18, 1951; (2) that the charterer either by his failure to nominate a shipper or by his reiterated nomination of alleged shippers who were, in fact, unwilling and unable to accept notice of readiness, evinced an intention not to perform the charterparty or, at least, not to perform it in accordance with its terms, and were thus guilty of an anticipatory breach of contract which the owners were entitled to accept as a repudiation of the charterparty, as they in fact did. They also relied, both in connexion with their allegations of breach of condition and with their allegations of repudiation, upon the charterer's failure to provide cargo at Basrah or to nominate a berth there.

The charterer contended, inter alia, that there was no breach of the charterparty in relation to the nomination of shippers, nomination of berth or provision of cargo; that, if any breach were committed, it was not a breach of condition, but a breach of a term which sounded in damages only and, accordingly, the charterer was not entitled on July 18, 1951, to treat the charterparty as at an end; that he had not, on July 18, evinced an intention not to perform the whole contract; at the worst he was on that date only unable to perform and mere inability to perform was never sufficient to bring about an anticipatory breach of a contract, but that, if that contention were wrong as a matter of law, nevertheless, before inability to perform could as a matter of law bring about an anticipatory breach of the contract, it must be inability of an irretrievable nature, and there was no such irretrievable inability in the present case. He relied on the fact that by July 18, 1951, lay time had not expired.

The arbitrator found, on the owners' first contention, inter alia, that the charterer never at any time nominated a shipper at or with a representative at Basrah able, ready and willing to accept notice of readiness there; and held that he had thereby committed a breach of clause 5 of the charterparty, as such nomination ought to have been made at the latest by the time that the vessel arrived at the buoys at 2.34 p.m. on July 12, 1951; that if it was necessary to consider when a reasonable time for making such a nomination expired, it had expired by the time that the vessel arrived at the buoys. If, contrary to his view, the charterer was not obliged to nominate a shipper at Basrah until after the vessel had arrived, a reasonable time for the nomination had expired by the time that the vessel was rechartered on July 18, 1951. He held as a matter of law that failure timeously to nominate a shipper did not amount to a breach of condition of the charterparty, and that the owners were not entitled to rely upon that failure to justify their action in rechartering. He held further that there was no breach of the obligations to provide a cargo or to nominate a berth as a reasonable time for fulfilling those obligations had not expired by July 18, 1951. Accordingly, the owners failed on their first point.

On the assumption that lay time began to run on July 12, 1951, the arbitrator found that it would have expired on July 21, 1951; that no cargo had been brought to the loading wharf by July 18, 1951, or would have been brought there by July 21; and that the cargo could not possibly have been loaded within the lay time remaining between July 18 and July 21.

On the issue of anticipatory breach, the arbitrator accepted the charterer's contention that he could only look at the events which had occurred and which were known to the owners on July 18, 1951. He accordingly excluded from consideration everything which occurred before that date or thereafter which was unknown to the owners on that date. On that basis he found that on July 18, 1951, there was no person or shipper in Basrah or elsewhere in Iraq who was prepared to ship any scrap iron on board the vessel, but that the charterer was not aware that that was so; that the only person in Iraq who had scrap iron in his possession or control which could have been used for shipment on board the vessel was Vassos, and the charterer, by July 18, 1951, was aware that that was so; that on July 18, 1951, Vassos was not prepared to ship any scrap iron on board the vessel; that the charterer on July 18, 1951, was aware that Vassos had refused so to ship, but hoped that he might agree thereafter; that the charterer was encouraged in that hope by Chbib; that Vassos was in fact not prepared at any time after July 18, 1951, to sell any scrap iron which he owned or controlled either to the charterer, Haddad or Chbib, but that the charterer until July 23 or 24, 1951, continued to hope, and was encouraged by Chbib to hope, that Vassos might agree to ship; that even if Vassos had agreed to ship on board the vessel, such shipment on or after July 18, 1951, could only have taken place if the owners had been prepared to break the fresh charterparty into which they had entered; that there was no evidence from which it could be inferred that the owners would have been prepared to do so; that even if Vassos had agreed to ship, such agreement would in all probability have been conditional upon Vassos receiving a greatly enhanced price; that the charterer on July 18, 1951, was not able to perform the charterparty; that he was willing to perform it if and when cargo became available to load.

In paragraph 34 of the award the arbitrator made further findings at the request of the parties, the effect of which was as follows: That a reasonable shipowner on July 18, 1951, would have concluded (1) that the charterer was always willing to perform if he could; (2) that he could not have performed by the end of the lay days or within a reasonable time thereafter; (3) that he could have performed before the delay became so long as to frustrate; (4) that a reasonable shipowner on the facts known to the owners on July 18, 1951, as interpreted in the lights of later events would conclude that the charterer was willing to perform his obligations but would be unable to do so within a reasonable time, and would be unable to do so before such time as would frustrate the charterparty.

In so far as it was a question of fact he found, and in so far as it was a question of law he held, that the charterer evinced an intention not to perform the charterparty and committed an anticipatory breach of it, which the owners were entitled to treat and accept, and did treat and accept, as a repudiation of the charterparty by rechartering the vessel on July 18, 1951. In his opinion the owners were entitled to an interim award on liability in their favour on their second contention.

The question of law for the court was whether upon the facts found, and upon the true construction of the charterparty, the owners were entitled on July 18, 1951, to treat the charterparty as discharged by the charterer's breach, and to claim damages accordingly.

Subject to the decision of the court the arbitrator answered the question in the affirmative and awarded (a) that the charterer broke the charterparty and was liable in damages to the owners; (b) that the charterer's counterclaim failed and was dismissed; (c) that the charterer pay the costs of the reference.

In the alternative (if the court answered the question in the negative) he awarded (a) that the charterer did not break the charterparty and was not liable in damages to the owners; (b) that the owners' claim failed and was dismissed; (c) that the owners were liable to repay the charterer the sum claimed by way of advance of freight; (d) that the owners pay the costs of the reference.

A. A. Mocatta Q.C. and *Michael Kerr* for the charterer. Before the arbitrator the owners claimed that they were entitled to cancel the charter on two main grounds, (1) that the charterer had committed breaches of certain fundamental terms of the charterparty, and (2) that he had repudiated the charterparty by evincing an intention not to be bound by it. It is not proposed at this stage to argue whether or not there was a breach at all. The arbitrator's findings are accepted. The only breach found, i.e., failure to nominate a shipper, was held to be a breach of warranty which did not of itself entitle the owners to rescind.

The question for the court arising out of the arbitrator's conclusion on anticipatory breach raises the following main issues: Where a party is willing to perform a contract but is unable to do so through no fault of his own, when, if at all, does that inability amount to repudiation when the contract is not one of which time is the essence? If inability can amount to repudiation, what is the proper test to be applied in relation to time under the contract? Is it where the innocent party believes that the defaulting party is unable to perform within a reasonable time, or where he cannot perform within such time as would frustrate the contract? A further question is to what extent, if at all, is the court entitled to have regard to matters which occurred before or after the date on which the repudiation was alleged to have taken place which were not at the time known to the innocent party.

Whether a party to a contract has evinced an intention not to be bound by it depends on the conclusion that a reasonable man would draw from the overt acts or words of the party alleged to have repudiated. When conduct is relied on as repudiation it must be judged on the same basis, i.e., on the overt acts or words of the guilty party. Inability to perform as distinct from unwillingness cannot amount to repudiation as it cannot be interpreted as evincing an intention not to be bound: see *Freeth* v. *Burr*,[1] where the classic statement on evincing an intention appears in the judgment of Lord Coleridge C.J.[2] That excludes inability. In the same case Keating J.[3] appears to have regarded it as throwing some light on the way in which the conduct of the party is to be assessed. Lord Coleridge's statement was approved by the House of Lords in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*[4]: see *per* Lord Selborne.[5] Reliance is also placed

---

[1] (1874) L.R. 9 C.P. 208.

[2] Ibid. 213.

[3] Ibid. 215.

[4] (1884) 9 App.Cas. 434.

[5] Ibid. 438.

1957

UNIVERSAL CARGO CARRIERS CORPORATION
v.
CITATI.

on *Johnstone* v. *Milling*,[6] where it was held that a lessor who had failed to rebuild premises because he had been unable to find the money to do so had not repudiated. Lord Esher M.R.,[7] who dealt with the matter on the basis of renunciation, stated that inability to perform did not amount to repudiation. Cotton L.J.[8] took the view that whether inability amounted to renunciation depended on the circumstances of the case and the nature of the contract. Bowen L.J.'s approach was on all fours with Lord Esher M.R.'s. On Cotton L.J.'s approach it may be that a statement by a party to a contract that he is unable to perform is a circumstance which can be taken into consideration in deciding whether an intention has been evinced not to be bound, but that does not mean that it can by itself amount to repudiation. In the classic statements of the law on repudiation by way of anticipatory breach inability is not mentioned except in circumstances where a party has put it out of his power to perform: see *Heyman* v. *Darwins Ltd.*,[9] *per* Lord Porter [10]; Chitty on Contracts, 21st ed., vol. 1, p. 192, para. 364; Halsbury's Laws of England, 3rd ed., vol. 8, p. 202, para. 456. There is a distinction between that type of case and the present where a person does his best to perform but fails to do so. *Thorpe* v. *Fasey* [11] obliquely raises the point as to the distinction to be drawn between inability to perform and renunciation and is a clear decision that inability coupled with willingness does not amount to repudiation. That case is important because there there was the rare concatenation of circumstances of a man saying "I would like to but I cannot." Here the circumstances are the same. [Reference was also made to *Southern Foundries (1926) Ltd.* v. *Shirlaw* [12] and *Shaffer (James) Ltd.* v. *Findlay, Durham and Brodie.*[13]]

If that submission is held to be wrong, or untenable in this court, then inability can only amount to repudiation if it is of an irretrievable nature in relation to the particular contract. In contracts such as the present, of which time is not of the essence, it can only amount thereto if it persists for such a time as would frustrate the contract. The test of reasonable time, which the arbitrator has applied, is inapplicable. The mere fact that a ship does not load within a reasonable time after the expiry of the lay days does not entitle the owner to withdraw the ship and abandon the charter: *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*,[14] *per* Scrutton L.J.,[15] where the question was whether a fixed rate of demurrage applied throughout the whole period of detention of a ship after the lay days had expired, and it was held that it did. Warrington L.J. expressed no view as to the right to withdraw the ship, but the passage in Scrutton L.J.'s judgment,[15] on which reliance is placed, though obiter, supports my submission. Reliance is also placed on dicta of Roche and Greer L.JJ. in *Harold Wood Brick Co. Ltd.* v. *Ferris*,[16] which, although obiter, indicate that inability only amounts to repudiation if it be a permanent disability. Here there was nothing to show that the charterer would not be able to perform the charterparty before the frustration date, and if the dictum of Scrutton L.J. in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[17] and the dicta of Roche and Greer L.JJ. in *Harold Wood Brick Co. Ltd.* v. *Ferris* [18] are correct the charterer is entitled to submit that the arbitrator misdirected himself in law in applying the test of reasonable time.

---

[6] (1886) 16 Q.B.D. 460; 2 T.L.R. 249.

[7] 16 Q.B.D. 460, 468.

[8] Ibid. 471.

[9] [1942] A.C. 356; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[10] [1942] A.C. 356, 397.

[11] [1949] Ch. 649; 65 T.L.R. 561; [1949] 2 All E.R. 393.

[12] [1940] A.C. 701; 56 T.L.R. 637; [1940] 2 All E.R. 445.

[13] [1953] 1 W.L.R. 106.

[Devlin J. Assuming against you that "I cannot" is equal to "I will not," and the test in relation to actual breach of an obligation is reasonable time, how can it be different in the case of anticipatory breach?]

In order to rescind on the ground of an actual breach, there must be a breach of a condition of the contract or such a breach of warranty as will go to the root of it, i.e., that will frustrate it. The test must be the same in the case of an anticipatory breach: see *Thorpe* v. *Fasey*,[19] *per* Wynn-Parry J.[20] Where time is not of the essence of a contract, delay in fulfilling the obligations thereunder when it arises from inability and not from unwillingness is a breach of warranty and not a breach of condition, and it can only give rise to rescission if it is such as to make it plain that the party in default will be incapable of performing the contract: *Evera S.A. Commercial* v. *North Shipping Co. Ltd.*,[21] *per* Devlin J.[22] The obligation to load within the lay days is not a condition but a warranty: *Aktieselskabet Reidar* v. *Arcos Ltd.*[23] There is no term of the contract making it a condition and the only way in which it could have become one is if a notice had been given making time of the essence. Such notice could only have been given after the lay days had expired, and therefore notice is of no importance in the present case, because the ship was withdrawn before the lay days had expired.

---

[14] [1917] 2 K.B. 193.
[15] Ibid. 201.
[16] [1935] 2 K.B. 198, 204, 208.
[17] [1917] 2 K.B. 193, 201.
[18] [1935] 2 K.B. 198, 204, 208.
[19] [1949] Ch. 649.
[20] Ibid. 661.
[21] [1956] 2 Lloyd's Rep. 367.
[22] Ibid. 376.
[23] [1927] 1 K.B. 352; 42 T.L.R. 737.

As to the obligation to provide cargo, the same reasoning applies. That obligation is to have it there by the time the ship arrives or within a reasonable time thereafter so that the ship can be loaded within the lay days, but that is a warranty only and not a condition. Admittedly there is a finding against the charterer that the ship could not have loaded within the lay days remaining, but there is also a finding that the time for providing the cargo had not passed by July 18, the alleged date of repudiation. If, contrary to the arbitrator's finding, there was a breach of warranty, the owners were not entitled to rescind on the basis of that breach unless it had continued for such time as would frustrate the charterparty. The same considerations apply to the failure to nominate a berth.

Forslind v. *Bechely-Crundall*[24] justifies the arbitrator's finding of law that he could have no regard to matters occurring after July 18—which both parties regard as the crucial date—which had not on that date come to the knowledge of the owners.

Ashton Roskill Q.C. and *H. V. Brandon* for the shipowners. It is immaterial to the owners' case whether the charterparty was a berth charterparty (as the arbitrator has held) or a port charterparty: *North River Freighters Ltd.* v. *H.E. President of India.*[25] Whichever be the category (berth or port) within which the charterparty falls, the charterer was under an obligation to nominate shippers to whom notice of readiness could be given. Until such notice was given, lay time proper could not start to run under the charterparty. The charterer failed to nominate shippers and there is a finding of fact that a reasonable time for such nomination had expired by the time the vessel had arrived at the buoys at Basrah on July 12 or, at the latest, by the time the vessel was rechartered on July 18. The obligation to nominate shippers was fundamental because time under the charterparty could not start to run until notice of readiness was given, and notice of readiness could only be given to the shippers. Therefore, failure to nominate shippers effectually operated to prevent the working of the charterparty in a vital respect. The owners are entitled to succeed on the basis of this breach alone.

Further, although a charterer is not obliged to have cargo available by the time the ship arrives, he must have it there in time to enable the ship to be completely loaded within the lay days: *Vergottis* v. *Wm. Cory & Son Ltd.*,[26] *per* Greer J.[27] If he does not, there is a breach of condition: see *Ardan S.S. Co.* v. *Weir*,[28] where the obligation to furnish a cargo is described as a "primary" obligation. Even if (which is not conceded) "primary" is not synonymous with "fundamental," it must be closely related thereto. As to your Lordship's observations in *Chandris* v. *Isbrandtsen-Moller Co.*[29] on the meaning of the word "primary," whether or not that word is synonymous with "preliminary" does not affect the fundamental character of the obligation of the charterer to furnish cargo. The fact that breach of the obligation to load within the lay days can be paid for by demurrage and must therefore be treated as a warranty and not as a condition does not mean that failure to furnish cargo so that a vessel can be completely loaded within the lay days is not, or may not be, a breach of condition.

---

[24] 1922 S.C.(H.L.) 173.

[25] [1956] 1 Q.B. 333; [1956] 1 All E.R. 50.

Further, the charterer was under an obligation to nominate a berth to enable the cargo to be completely loaded within the lay days. This obligation flows from the obligation to furnish cargo. Both obligations are, it is submitted, fundamental. On the facts found in the award the charterer failed to furnish any cargo at any time and could not have furnished cargo so as to enable the ship to be completely loaded within the lay days. The same facts show that a berth could not have been nominated in time for the vessel to be completely loaded within the lay days. It is therefore submitted that in these two further respects the charterer was in repudiation of the charterparty.

If, contrary to this submission, the failure to furnish cargo was a breach of warranty only, there is still a breach of one or more conditions, i.e., the failure to nominate a shipper and the failure to nominate a berth. Alternatively, if those breaches were breaches of warranty only, then breaches of two or more warranties can amount to a breach of condition or fundamental term, because there would then be a breach of the obligation to perform the charterparty as a whole.

If the court is not satisfied that there was breach of a condition or fundamental term of the charterparty, then reliance is placed on the arbitrator's finding of anticipatory repudiation. Whether there has been repudiation or not is a question of fact to be decided on the acts and conduct of the party alleged to have repudiated. The cumulative effect of the facts found by the arbitrator fully justifies his conclusion that the charterer evinced the intention not to be bound by the charterparty. The charterer's submissions with regard to his disablement do not touch the matter. It makes no difference, if a party has failed to perform, whether he has disabled himself from doing so or, simpliciter, does not perform. The question is: Is he able and willing to perform his contract? Inability is part and parcel of unwillingness. A party does not the less repudiate by saying "I would if I could but I can't."

---

[26] [1926] 2 K.B. 344.

[27] Ibid. 354.

[28] [1905] A.C. 501; 21 T.L.R. 723.

[29] [1951] 1 K.B. 240, 252; 66 T.L.R. (Pt. 1) 971; [1950] 1 All E.R. 768.

The passage in Scrutton L.J.'s judgment in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[30] relied on by the charterer does not support his submission that inability, if it is to amount to repudiation, must be irretrievable and such as to frustrate the contract. The Lord Justice does not say in that case that a claim for anticipatory repudiation against a charterer who has failed to perform his obligation can only succeed if the delay is such as to frustrate the charterparty. He is, if anything, contrasting repudiation and frustration. Alternatively, in that passage, he is not directing his mind to anticipatory repudiation at all. In any event, this question has to be decided on the ordinary principles of the law of contract and not in the light of the somewhat esoteric issue which arose for decision in the *Inverkip* case,[30] namely, whether shipowners were entitled to damages, as distinct from the demurrage rate, in respect of part of the period of time during which a ship was detained by charterers. On common law principles the owners are entitled to succeed: see *Millar's Karri and Jarrah Co. (1902)* v. *Weddel, Turner & Co.*[31]

The charterer's submission that inability to perform cannot produce repudiation unless it continues for such time as would amount to frustration of the contract confuses two different principles, namely, anticipatory repudiation of a contract, and its dissolution by operation of law, viz., frustration. There is no true connexion between the two and no comparison of like with like. It does not follow as a matter of law that because in different circumstances delay could produce frustration of a contract, an equivalent amount of delay is necessary before it can be said that the contract has been repudiated.

[Devlin J. If the breach would not of itself entitle you to rescind, you cannot go further and say that an anticipatory breach of that obligation would entitle you to do so. [Reference was made to *Thorpe* v. *Fasey*, *per* Wynn-Parry J.[32]] The broad proposition advanced on behalf of the charterer is that in order to justify rescission there must be shown either a breach of condition or such a breach of warranty as to go to the root of the contract, i.e., as will frustrate it.]

---

[30] [1917] 2 K.B. 193, 201.

[31] (1908) 14 Com.Cas. 25; 100 L.T. 128.

Rescission is justified if there is inability to perform the contract within a reasonable time within which performance must take place. The case is a fortiori if a party to a contract shows that he is unable to perform it whatever time for performance may be given. This, it is submitted, was what was under consideration in *Thorpe* v. *Fasey*.[32] What is reasonable is to be decided by the tribunal having regard to the commercial exigencies of the situation. Here, although the charterer never in fact said that he was going to break the charterparty, his conduct and the cumulative effect of the facts found were such as to justify the conclusion of repudiation.

[DEVLIN J. referred to McElroy and Glanville Williams on Impossibility of Performance, (1941), p. 121, and to the cases cited therein.] [If delay which goes to the root of the contract is synonymous with the frustration period, then frustration must be the right test. There is a finding in the award that the delay was not such as to frustrate the object of the voyage.]

No. The only finding in this connexion in the award is that a reasonable shipowner on the facts known to the owners by July 18, 1951, would not then conclude that the charterer would not be able to perform his obligations under the charterparty before the expiry of such time as would frustrate the charterparty: the opposite conclusion is reached if such facts are interpreted in the light of after-events.

[DEVLIN J. referred to *MacAndrew* v. *Chapple*.[33]]

Let it be assumed that historically frustration derives from the principle of failure of consideration; this conception is driven too far in McElroy and Glanville Williams on Impossibility of Performance, p. 121. When the doctrine of failure of consideration was developing, the doctrine of anticipatory breach had not developed at all. In considering whether a contract has been repudiated by delay, the court is not tied to the yardstick of frustration. *MacAndrew* v. *Chapple*[33] enunciates what is now expressed compendiously in Chitty on Contracts, 21st ed., vol. 1, p. 252. The proper test is whether the business efficacy of the contract is destroyed by the breach. Of course, frustration of a contract involves ex hypothesi that its business efficacy is gone. But delay short of what would effect frustration may still destroy a contract's business efficacy. Technical questions of frustration are beside the point. To apply the frustration yardstick involves confusion of two different legal conceptions. Frustration automatically brings the contract to an end. Upon a repudiation by one party the other party has the right to elect to keep the contract alive. So the delay must not be so long as the life of the contract. Further, frustration must be irrelevant because, as it automatically destroys the contract, there is nothing for the injured party to keep alive, and, even if he wished to do so, there would be no point in so doing.

---

[32] [1949] Ch. 649, 661.

[33] (1866) L.R. 1 C.P. 643.

[DEVLIN J. On the authorities delay must be such as to go to the root of the contract. Both Scrutton L.J. in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[34] and Willes J. in *MacAndrew* v. *Chapple*[35] equate going to the root of the contract with frustration. Is there any authority which equates it with reasonable time?]

There appears to be no conclusive authority, but on principle reasonable time is the test which should be applied: see *Gcipel* v. *Smith.*[36] An undertaking of a commercial character for which no time of performance is fixed has to be performed within a reasonable time. If it is not so performed, there is a breach or repudiation according to the importance that falls to be attached to the non-performance of the obligation.

The doctrine of notice making time of the essence has no application in contracts of this nature. It would necessarily involve unilateral variation of the contract. To import it into commercial contracts would be dangerous and unreasonable: see *Reuter, Hufeland & Co.* v. *Sala & Co.*,[37] *per* Cotton L.J.[38]

If the argument as to reasonable time is unacceptable and the frustration test is the proper test to apply, the finding in the award that the charterer could have performed before the frustration date cannot stand because it is based solely on the facts known to the owners on July 18, 1951. On the true facts it is clear that the charterer was on July 18 completely disabled from finding a cargo and thus from performing his obligation under the charter. Reliance is placed on the alternative findings on the basis of the charterer's conduct looked at in the light of after-events. The arbitrator was wrong in excluding those events from his consideration. It is a well-established principle of law that after-events may be taken into consideration in ascertaining the true position: see *British & Beningtons Ltd.* v. *N. W. Cachar Tea Co. Ltd.*, *per* Lord Sumner[39]; *The Savona*[40]; *Bank Line Ltd.* v. *Arthur Capel & Co.*, *per* Lord Sumner.[41] [Reference was also made to *Andrew Miller & Co. Ltd.* v. *Taylor & Co. Ltd.*[42]; *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*[43]] *Forslind* v. *Bechely-Crundall*,[44] on which the arbitrator based his exclusion of them, does not conflict with that submission. If, on the true facts, it was clearly impossible on July 18 for the charterer to perform his part of the charter, the owners were justified in withdrawing the ship notwithstanding that they may not have been entitled to do so on the facts known to them at the time.

---

[34] [1917] 2 K.B. 193, 201.

[35] L.R. 1 C.P. 643, 648.

[36] (1872) L.R. 7 Q.B. 404.

[37] (1879) 4 C.P.D. 239.

[38] Ibid. 249.

[DEVLIN J. Are you entitled to submit that there is an actual finding that the charterer would never be able to provide a cargo?]

It is submitted that there is such a finding, but, even if there is no such actual finding, the cumulative effect of the facts found shows conclusively that there was inability ever to perform. It is for the court to draw inferences of fact and the court has power to do so: see R.S.C., Ord. 34, r. 1. The court cannot substitute its own inferences of fact for those drawn by an arbitrator, but no authority supports the proposition that the court cannot draw its own inferences. The point was taken before the arbitrator: the pleadings are not annexed to the award, but should if necessary be looked at in this connexion. But whether it was taken or not, the court is entitled to deal with it on the facts found, having regard to the form in which the question for the court is stated: see *Hudson's Bay Co.* v. *Domingo Mumbru Sociedad Anonima*,[45] which is conclusive on the point. *Minister of Food* v. *Reardon Smith Line Ltd.*[46] is distinguishable because there the question for the court was stated narrowly. But if the court is of the opinion that it cannot deal with this question of inability on the facts found in the special case it should exercise its power under section 22 of the Arbitration Act, 1950, and remit to the arbitrator for further findings. [Reference was made to *Re an Arbitration between Baxters and Midland Railway Co.*[47]]

[39] [1923] A.C. 48, 71, 72.

[40] [1900] P. 252.

[41] [1919] A.C. 435, 454, 455; 35 T.L.R. 150.

[42] [1916] 1 K.B. 402; 32 T.L.R. 161.

[43] [1935] A.C. 524.

[44] 1922 S.C.(H.L.) 173.

[45] (1922) 10 Ll.L.Rep. 476.

[46] [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265.

[47] (1906) 95 L.T. 20.

1957

UNIVERSAL CARGO CARRIERS CORPORATION
v.
CITATI.

Mocatta Q.C. and *Michael Kerr* in reply. As to the alleged breaches, on the true construction of this charterparty there was no term which obliged the charterer to nominate a shipper and no such term should be implied. The object of nominating shippers to whom notice of readiness can be given is for the protection of the charterer. If he acts in such a way as to make it impossible for notice to be given he must be put in the same position as if it had been given. The only effect of giving notice of readiness is that lay time begins to run, but if, on the authority of *North River Freighters Ltd.* v. *H.E. President of India*,[48] time begins to run while the vessel is waiting for a berth, notice would appear to be of no importance. There is no reason why the court should import into the charterparty a provision which is not expressed. The common law obligation on the owners is to give notice of readiness to the charterer with whom there is a contractual nexus. There is none between the owners and the shipper until the latter has performed some part of his duty in bringing the cargo to the ship's tackle. If that be wrong, then the failure to nominate a shipper was not a breach of condition but a breach of warranty and the arbitrator rightly so held. Reliance is placed on *Aktieselskabet Reidar* v. *Arcos Ltd.*[49] As to the obligation to nominate a berth, if this was a port charter there could not have been a breach until the lay days had expired. If it was a berth charter, time lost waiting for a berth counts as loading time and therefore that obligation would seem to be unimportant.

[DEVLIN J. referred to *Vergottis* v. *Wm. Cory & Son Ltd.*[50]]

It is admitted that there is a finding that the ship could not have loaded by the end of the lay days, but reliance is placed on the further finding that a reasonable time for nominating a berth or providing cargo had not expired by July 18. On that finding there never was a breach of the obligation if it was a port charter, because the ship was withdrawn before the lay days expired. If it was a berth charter, nomination of a berth was irrelevant.

As to the obligation to provide a cargo, the law is not clear. In *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[51] both Scrutton and Greer L.JJ. had grave doubts whether *Ardan S.S. Co.* v. *Weir*[52] laid down the principle contended for by the owners that the obligation to provide cargo before the lay days expired is a condition of the contract. In that case the word "primary" is not used as a term of art but in its ordinary meaning. Reliance is placed on the observations of Devlin J. in *Chandris* v. *Isbrandtsen-Moller Co.*[53] on the meaning of the word " primary." In any event there is a finding that there was no actual breach.

---

[48] [1956] 1 Q.B. 333.

[49] [1927] 1 K.B. 352.

[50] [1926] 2 K.B. 344.

[51] [1917] 2 K.B. 193.

[52] [1905] A.C. 501.

On the question whether there was an anticipatory breach which the other party could accept, the owners' argument on inability affords no answer to the submissions that inability alone cannot evince an intention not to perform a contract. The passage in *Millar's Karri and Jarrah Co. (1902)* v. *Weddel, Turner & Co.*[54] on which he relied is not well founded. It did not stem from the binding authorities following *Freeth* v. *Burr.*[55]

The arbitrator's findings will not help the owners unless they can establish that reasonable time is the proper yardstick to apply in measuring delay arising out of breaches of warranty. They are in the same difficulty that Roche and Greer L.JJ. found themselves in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[56] Support for the charterer's submission that frustration is the only yardstick which can be applied in the absence of unwillingness and in the absence of notice making time of the essence is to be found in Scrutton on Charterparties (16th ed., 1955), p. 93, where it is stated that " a statement that a ship will not sail . . . or load " with all convenient speed is not a condition, but the delay may " be such as to frustrate the commercial purpose of the voyage." That statement goes back to the 11th edition, which was the last to be edited by Scrutton L.J. The early cases cited in McElroy and Glanville Williams on Impossibility of Performance (1941), p. 121, and on which reliance is placed, are cited in Scrutton as authority for that proposition. [Reference was made to *Dimech* v. *Corlett*[57]; *Tarrabochia* v. *Hickie*[58]; *MacAndrew* v. *Chapple*, *per* Willes J.[59]; *Clipsham* v. *Vertue*,[60] and *Freeman* v. *Taylor.*[61]] See also Scrutton on Charterparties, 16th ed., p. 350. In *Stanton* v. *Richardson*,[62] where a ship was found to be defective, the question arose as to the length of time which would be necessary to make her fit. The questions put to the jury on that matter were: If the ship was defective, was the captain willing and able to make her fit in a reasonable time? Was he willing and able to make her fit within such a time as would not have frustrated the object of the venture? To both questions the jury returned the answers " Willing, but not able."

---

[53] [1951] 1 K.B. 240, 252.
[54] 100 L.T. 128.
[55] L.R. 9 C.P. 208.
[56] [1917] 2 K.B. 193.
[57] (1858) 12 Moo.P.C. 199.
[58] (1856) 1 H. & N. 183.
[59] L.R. 1 C.P. 643, 648.
[60] (1843) 5 Q.B. 265.
[61] (1831) 8 Bing. 124.
[62] (1872) L.R. 7 C.P. 421.

[DEVLIN J. That case might be difficult for you on another limb of your argument.]

So far as the breach of warranty was concerned it was clear that the reason why the court held that the charterer was entitled to rescind was because the delay in making the ship fit was likely to be so long as would frustrate the object of the venture: see *per* Brett J.[63] and *per* Bovill C.J.[64] In addition to the dicta of Scrutton L.J. in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*,[65] to which reference has already been made, reliance is placed on further dicta to the same effect in *Snia Societa di Navigazione Industria e Commercio* v. *Suzuki & Co.*[66] The owners are entitled to say that in *Stanton* v. *Richardson*[67] Bovill C.J. referred to reasonable time or such time as would frustrate the object of the venture,[68] but that passage is not in accordance with the rest of his judgment or with the judgment of Brett J. In any event, if one talks of reasonable time at all, it can only be thought of as reasonable time in relation to the object of the venture. The arbitrator manifestly meant something different and therefore the test of reasonable time was improperly applied.

As to the finding of frustration on which the owners rely, *Forslind* v. *Bechely-Crundall*[69] clearly establishes that after-events cannot be taken into account in considering whether an intention has been evinced not to be bound by the contract. The owners cannot found an argument on the dicta of Lord Sumner in *British & Beningtons Ltd.* v. *N. W. Cachar Tea Co. Ltd.*[70] With the exception of *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster Ltd.*,[71] this is the first case where it has been sought to apply that principle in a case of anticipatory breach. That line of cases is patently irrelevant when considering an intention not to perform.

[DEVLIN J. intimated that he did not require further argument on that point on the present state of the case.]

[If the test is what did the conduct of the charterer on July 18, 1951, convey to the shipowner, then after-events must be excluded. That is clear from *Forslind* v. *Bechely-Crundall*.[72] But there may be a question whether the test laid down in *Bank Line Ltd.* v. *Arthur Capel & Co.*[73] and *Embiricos* v. *Sydney Reid & Co.*[74] has any application. I refused to apply that test in *G. W.*

---

[63] L.R. 7 C.P. 421, 437.
[64] Ibid. 433.
[65] [1917] 2 K.B. 193, 201.
[66] (1924) 29 Com.Cas. 284, 294.
[67] L.R. 7 C.P. 421.
[68] Ibid. 433.
[69] 1922 S.C.(H.L.) 173.
[70] [1923] A.C. 48, 71.
[71] [1955] 1 Lloyd's Rep. 303.
[72] 1922 S.C.(H.L.) 173.
[73] [1919] A.C. 435.
[74] [1914] 3 K.B. 45.

Grace & Co. v. *General Steam Navigation Co.*[75] If on the true facts, although not known to the shipowners at the time, the charterer was on July 18 unable to fulfil the contract, why were the owners not entitled to sail the ship away? The *Forslind*[76] line of cases was designed to ascertain whether by his conduct a man is saying "I will not" or "I cannot." *Stanton* v. *Richardson*[77] seems to indicate that it is not primarily the conduct of the man which is important but the fact that he cannot perform. Is that to be answered in the light of all the facts now known or in the light of some limited facts?]

The test laid down in *Bank Line Ltd.* v. *Arthur Capel & Co.*[78] and *Embiricos* v. *Sydney Reid & Co.*[79] is inapplicable to a case of repudiation. *Stanton* v. *Richardson*[80] must be read in relation to the facts of the case. The questions put to the jury would not necessarily be the right ones in a case such as the present where there were facts in existence which were not known to the parties at the time of the breach. Evidence of future events cannot be admissible. There is no authority to the contrary. But if the true question to be decided on the basis of *Stanton* v. *Richardson*[80] is: was the charterer in fact able to load before the expiry of the lay days, the question arises, to what extent is it open to the court to answer that question on the special case? The law laid down in *Hudson's Bay Co.* v. *Domingo Mumbru Sociedad Anonima*[81] and *Minister of Food* v. *Reardon Smith Line Ltd.*[82] is accepted. If the court is asked a question of law on a special case the parties are entitled to advance any principle of law which will persuade the court to answer that question in their favour provided that there are findings of fact on the face of the special case relevant to those principles of law, but if there are not, then the court will not remit the special case unless it is satisfied that principles of law were advanced before the arbitrator with which he has not dealt. If a party has argued a point of law before the arbitrator and asked him to find facts in a certain way and he has not done so, that is technical misconduct and the party can ask for remission. In the present case the owners cannot make any formal application for remission. All they can do is to invite the court to exercise its own power to do so. Prima facie, the court ought not to exercise its own power to remit

---

[75] [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201.

[76] 1922 S.C.(H.L.) 173.

[77] L.R. 7 C.P. 421.

[78] [1919] A.C. 435.

[79] [1914] 3 K.B. 45.

[80] L.R. 7 C.P. 421.

[81] 10 Ll.L.Rep. 476.

[82] [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265.

1957

UNIVERSAL CARGO CARRIERS CORPORATION *v.* CITATI.

unless it cannot answer the question of law and wishes to remit for its own purposes. [Reference was made to *Société Co-operative Suisse des Céréales et Matières Fourragères* v. *La Plata Cereal Co. S.A.*[83] and *Tatem Steam Navigation Co. Ltd.* v. *Anglo-Canadian Shipping Co. Ltd.*[84]] The position is no different if all that is required is for the court to draw an inference from the facts in the case. It will not be done in order to deal with a question of law not argued below. The court must look at the special case bearing in mind the specific questions put to the arbitrator and agreed by counsel and the arbitrator's summaries of the arguments which show to what matters he directed his mind in making his findings of fact. The whole framework of the special case is directed to answering the questions relating to the evincing an intention not to perform. The findings of the arbitrator fall far short of final and irretrievable inability and the court is not entitled to draw that inference. Provided that an arbitrator has directed himself properly on the law, all conclusions of fact and inferences from fact are for the arbitrator: *Nello Simoni* v. *A/S M/S Straum*[85]; *Strathlorne S.S. Co. Ltd.* v. *Andrew Weir & Co.*[86]; *Royal Greek Government* v. *Minister of Transport*[87]; *North Western Cachar Tea Co. Ltd.* v. *British & Beningtons Ltd.*,[88] and *Produce Brokers Co.* v. *Weiss & Co.*,[89] *per* McCardie J.[90]

[He was stopped on that point.]

[DEVLIN J. intimated that he was not prepared of his own motion to remit the special case but that he would be prepared to consider applications by the owners for remission and for an extension of time to allow such an application to be made.]

[After hearing counsel on both sides, his Lordship acceded to applications made by Mr. Roskill for an extension of time to allow an application to remit to be made and for remission to enable the arbitrator to answer the following question: "Whether the "charterer was on July 18, 1951, willing and able to perform "the charterparty within such time as would not have frustrated "the commercial purpose of the venture?" His Lordship intimated that the applications would be allowed on terms that any further costs incurred as a result of the remission should be paid by the owners. Leave to appeal against remission was granted to Mr. Mocatta. The argument then continued on the basis that there was a finding that the charterer was unable to perform the charterparty before the date of frustration of the venture.]

---

[83] (1947) 80 Ll.L.Rep. 530.

[84] (1935) 53 Ll.L.Rep. 161.

[85] (1949) 83 Ll.L.Rep. 157.

[86] (1934) 40 Com.Cas. 168.

[87] (1949) 83 Ll.L.Rep. 228.

[88] (1922) 10 Ll.L.Rep. 381.

[89] (1918) 87 L.J.Q.B. 472.

[90] Ibid. 476.

Mocatta Q.C., with reference to his submission that inability without unwillingness could not by itself amount to repudiation, referred to *Maple Flock Co. Ltd.* v. *Universal Furniture Products (Wembley) Ltd.*,[91] and continued: In considering whether the charterer, by his inability to perform, has evinced an intention not to perform, inability must be judged in the same way as unwillingness. Where the date of final performance has not been reached an innocent party can only rescind if the conduct of the defaulting party is such as to justify the innocent party, as a reasonable man, in reaching the conclusion that the defaulting party was unwilling or unable to perform the contract.

[DEVLIN J. It is put against you that inability in fact is different. Is there any authority for the proposition that inability can only be dealt with by inferring an intention?] [Reference was made to *Stanton* v. *Richardson*.[92]]

Inability comes under the head of renunciation except where it arises from a deliberate act on the part of the defaulting party: *Heyman* v. *Darwins Ltd.*, *per* Lord Porter.[93] Where there is no such act, the only question is whether the conduct of the party is such as to evince an intention not to perform. The literal truth is immaterial whether or not it is ascertained from events occurring afterwards not known to the innocent party at the time of the breach. There is no case which is directly on the point, but equally there is no case which suggests that that submission is wrong. *Millar's Karri and Jarrah Co. (1902)* v. *Weddel, Turner & Co.*,[94] *In re Phoenix Bessemer Steel Co.*[95] and *In re Agra Bank*[96] suggest that it is correct. *Stanton* v. *Richardson*[97] does not assist one way or the other. The form of the questions put to the jury depended on the facts of the case. There would have been no object in asking the questions in any other form on the evidence before the jury. The only way in which inability can be brought under the heading of "Impossibility" is if the defaulting party does some act which he knows at the time will render him incapable of performing the contract: see Halsbury's Laws of England, 3rd ed., vol. 8, p. 202, para. 342, and Chitty on Contracts, 21st ed., vol. 1, p. 252, para. 456. All the cases there cited are cases of self-induced inability. [Reference was also made to *Warburton* v. *Storr*[98]; *Lovelock* v. *Franklyn*[99]; *M'Intyre* v. *Belcher*[100]; *In re Imperial Wine Co., Shircff's Case*[101]; *Synge* v. *Synge*,[102] and *Hochster* v. *De la Tour*.[103]] *Omnium d'Enterprises* v. *Sutherland*[104] is cited by the editors of Chitty on Contracts, 21st ed., vol. 1, p. 192, para. 364, under "Renunciation." If that submission is correct no further answer is required. On the case as it stands the charterer is entitled to succeed.

---

[91] [1934] 1 K.B. 148; 50 T.L.R. 58.

[92] L.R. 7 C.P. 421.

[93] [1942] A.C. 356, 397.

[94] 100 L.T. 128.

[95] (1876) 4 Ch.D. 108.

[96] (1867) L.R. 5 Eq. 160.

[97] L.R. 7 C.P. 421.

Roskill Q.C. The charterer's submission that the only inability which can avail the shipowners is inability deliberately created by the charterer is unsound. No authority supports it. The insolvency cases which were cited, namely, *In re Agra Bank*[105] and *In re Phoenix Bessemer Steel Co.*,[106] lay down no such general principle, and the observations of Lord Sumner in the *N. W. Cachar Tea* case[107] are against it. [Reference was also made to Leake on Contracts, 7th ed., p. 658.]

Cur. adv. vult.

March 12. Devlin J. read the following judgment. This case gives rise to a difficult question. How long is a ship obliged to remain on demurrage, and what are the rights of the owner if the charterer detains her too long? Translated into the terms of general contract law, the question is: Where time is not of the essence of the contract—in other words, when delay is only a breach of warranty—how long must the delay last before the aggrieved party is entitled to throw up the contract? The theoretical answer is not in doubt. The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it. The difficulty lies in the application, for it is hard to say where fact ends and law begins. The best solution will be found, I think, by a judge who does not try to draw too many nice distinctions between fact and law, but who, having some familiarity both with the legal principle and with commercial matters and the extent to which delay affects maritime business, exercises them both in a common-sense way. This is the sort of solution which, upon the supposition that it was acceptable to business men, the commercial court was created to provide.

---

[98] (1825) 4 B. & C. 103.

[99] (1846) 8 Q.B. 371.

[100] (1863) 14 C.B.N.S. 654.

[101] (1872) L.R. 14 Eq. 417.

[102] [1894] 1 Q.B. 466.

[103] (1853) 2 E. & B. 678.

[104] [1919] 1 K.B. 618.

[105] L.R. 5 Eq. 160.

[106] 4 Ch.D. 108.

[107] [1923] A.C. 48, 71.

It is not a solution which can be easily found by the process of arbitration, which requires the rigid separation of fact and law. There does not appear to have been any serious dispute about the primary facts—the case was tried on documentary evidence—but there was a great deal of dispute about the inferences of fact to be drawn from them. I venture to think that either a judge or an arbitrator, given full jurisdiction over fact and law, could have disposed of the whole case in much less time than it would take the arbitrator separately to settle the facts and the judge separately to settle the law. The central question being, it was thought, what was the meaning to be attached by a reasonable shipowner to the conduct of the charterer, the arbitrator has found sixteen different shades of meaning, so that the law may be fully argued. But Mr. Ashton Roskill has submitted that the sixteen are not enough—he ought to have found what the true meaning would be in the light of earlier events as well as of later ones. Much of my time (not all, for there are difficult questions of law, which have been fully and most helpfully argued) has been occupied with the sort of questions that troubled the courts so much before the procedural reforms of the last century: What precisely are the facts found; what inferences of fact can be implied; what points are open to each side; and in what circumstances ought the award to be remitted for further findings? In the end I have had to accede to an application to remit. Much of this might have been shortened if I were permitted to draw inferences of fact, but it is well settled that I am not. The process of arbitration in this case has certainly increased greatly the expense of arriving at a just decision, and perhaps diminished the likelihood of a satisfactory one.

I am well aware that commercial men—particularly when, as in this case, they are foreigners—often have good reasons for preferring arbitration to litigation, which in their minds override the expense and the delay. But I do not think I do any disservice to the business community by reminding them how much extra in a case of this sort they do have to pay; and when in the end the bill comes in, I should not like either of the two foreign concerns which will have to pay it to suppose that it resembles, even remotely, the cost of obtaining judgment in England on a commercial matter.

I take the principal facts from the narrative at the beginning of the case stated. [His Lordship stated the facts as set out above and continued.] If the lay days are treated as running from July 12 at 2.34 p.m. when the vessel arrived at the buoys,

1957

UNIVERSAL CARGO CARRIERS CORPORATION v. CITATI.

Devlin J.

they would have expired on July 21. So, when the charter was cancelled on July 18, the lay days had only run for two-thirds of the time. The owners justify their action in cancelling before the lay days had expired by saying that on or before July 18 the charterer had committed an actual or anticipatory breach of his obligation under the charter.

The obligations which for this purpose fall to be considered are four: (1) To nominate a shipper. (2) To nominate a berth. (3) To provide a cargo. (4) To finish loading before the expiry of the lay days. The charterer submits that there was no obligation on him to nominate a shipper; he claims that the only consequence of his failure to do so would be that the owners were dispensed from the duty of giving notice of readiness. It might perhaps be otherwise, it was submitted, if the lay days did not begin to run until after notice of readiness was given, for then the operation of the charterer might be held up. But the decision of the Court of Appeal in *North River Freighters Ltd.* v. *H.E. President of India*[1] shows that under a charterparty in this form the lay days begin to run, in effect, from the time the vessel is ready to proceed to her berth, irrespective of whether or not a berth has then been nominated or whether notice of readiness has been given. The result, the charterer submits, is that the only person who can suffer from there being no notice of readiness is himself. This is a plausible contention; but I need not determine it one way or the other, for it is clear that the same sort of reasoning does not apply to the next two obligations.

The charterer admits that he was under an obligation to nominate a berth and also to provide cargo, the latter being a separate and distinct obligation from the obligation to load: see *Grant* v. *Coverdale, Todd & Co.*[2] But he submits that he would not be in breach of either of these obligations until after the expiry of the lay days. In my judgment this submission is not good. Since no time is mentioned in the contract within which these obligations have to be fulfilled, the law implies a reasonable time. All these obligations, i.e., the obligation to nominate a berth (and a shipper, if it be a term) and to provide a cargo, are obligations preliminary to loading the cargo. The obligation to load has a time prescribed for it in the charterparty; loading must be completed within the lay days and the charterer is in breach of contract if he fails so to do.

---

[1] [1956] 1 Q.B. 333; [1956] 1 All E.R. 50.

[2] (1884) 9 App.Cas. 470.

The time therefore within which the preliminary duties are to be performed is to be calculated by relation to the time prescribed for the main duty; they need not be performed any earlier than is necessary to enable the main duty to be performed timeously, but they may not be performed any later. The result is that the nomination of the berth and the provision of the cargo must be made in sufficient time to enable the vessel to be completely loaded within the lay days. In *Vergottis* v. *Wm. Cory & Son Ltd.*[3] Greer J.[4] so decided in relation to the obligation to provide a cargo, and in my judgment the same reasoning applies to the obligation to nominate a berth. The arbitrator has found that on July 18 6,000 tons could not possibly have been loaded in the lay time remaining. It must follow, therefore, that by July 18 the time for providing a cargo and nominating a berth had expired. In another part of the award the arbitrator finds that a reasonable time for providing cargo and for nominating a berth had not expired by July 18. I can account for this alternative finding only on the hypothesis that the arbitrator has not measured the reasonable time in the way in which as a matter of law I think it ought to be measured. Accordingly, this finding cannot stand, and I hold, contrary to the view of the arbitrator, that the charterer broke both these terms.

What of the obligation to load? On July 18 the lay days had not expired, but the charterer had by his dilatoriness put it out of his power to comply with the term that he must complete the loading by July 21. There cannot be an actual breach of the express term to complete loading by July 21, but Mr. Ashton Roskill was at one point of his argument disposed to submit that there was an implied term that a party should not do any act (and I should add, though this goes beyond Mr. Roskill's submission, be guilty of any omission) which would put it out of his power to perform his obligations. If this is right, the charterer had by July 18 committed an actual breach of that implied term. But whether the breach is said to be an actual breach of an implied term or an anticipatory breach of an express term is not to my mind at all important; and it must be one or the other.

The next point to be determined is whether any of the breaches was of a condition of the charterparty as distinct from a warranty. If so, then the owners were, ipso facto, entitled to rescind on July 18. In my judgment none of them is a condition. It is well settled, and not in this case disputed, that the obligation to load within the lay days is a warranty only and not a condition. Its breach does not entitle the owner to rescind, but gives rise to a claim for damages only; and in this charterparty, as in most others, those damages are liquidated damages paid in the form of demurrage. It would be strange if, when the main obligation to load is only a warranty, preliminary obligations should be given the status of a condition. It would be strange if, for example, the charterer were to be legally advised that he must not keep the vessel waiting idly at the buoys on pain of cancellation, but that if he nominated a berth he could keep her waiting idly at the berth by payment of demurrage. As to the obligation to provide a cargo, I am satisfied that it is concluded as a matter of authority that this obligation is a warranty only. I cited the authorities in *Chandris* v. *Isbrandtsen-Moller Co.*[5] I have in the light of Mr. Roskill's argument examined them again, but I am still of the opinion that in the above case I drew the right conclusion from them and I need not therefore repeat in detail the reasoning which is there set out. I think that the same reasoning must apply in principle to the obligation to nominate a berth.

---

[3] [1926] 2 K.B. 344.

[4] Ibid. 354.

It follows that the owners were not entitled ipso facto to rescind on July 18. But a party to a contract may not purchase indefinite delay by paying damages and a charterer may not keep a ship indefinitely on demurrage. When the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to rescind. What is the yardstick by which this length of delay is to be measured? Those considered in the arbitration can now be reduced to two: first, the conception of a reasonable time, and secondly, such delay as would frustrate the charterparty. The arbitrator, it is clear, preferred the first. But in my opinion the second has been settled as the correct one by a long line of authorities.

Before I refer to them, I must enlarge a little on what is meant in this connexion by frustration. The doctrine that a commercial contract is dissolved upon the happening of a supervening event which frustrates the object of the venture now plays so important a part in the law that a reference to frustration is likely to be taken as a reference to that doctrine. But the term was in use in relation to breach of contract well before the doctrine was declared in 1870 or thereabouts. For some time before that the courts had been using the yardstick of frustration for the measurement of delay caused by breach of contract. It was because the same yardstick was used for the measurement of delay caused by the supervening event that the new doctrine got its name of frustration. The history is most conveniently and concisely set out in McElroy and Glanville Williams' "Impossibility of Performance" (1941), p. 121. To bring a contract to an end by breach of warranty there had to be a failure of consideration, that is to say, the breach had to be such as to deprive the plaintiff in effect of the benefit of his contract. Various metaphors came into use for describing the character of such a breach, such as "going to the whole root and consideration of the contract" and "frustrating the object of the voyage." The former phrase was used by Lord Ellenborough in *Davidson* v. *Gwynne*,[6] and the second appears to have been used first in *Tarrabochia* v. *Hickie*.[7]

---

[5] [1951] 1 K.B. 240, 252; 66 T.L.R. (Pt. 1) 971; [1950] 1 All E.R. 768.

The authorities cited by Mr. Mocatta are *Freeman* v. *Taylor*[8]; *Clipsham* v. *Vertue*[9]; *Tarrabochia* v. *Hickie*[10]; *MacAndrew* v. *Chapple*,[11] *per* Willes J., and *Stanton* v. *Richardson*.[12] There is then a gap until in modern times there is a dictum of Scrutton L.J. in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[13] The point is also dealt with in Scrutton on Charterparties, 16th ed., p. 350, where it is stated that the shipowner cannot say that demurrage provisions apply only for a reasonable time; the shipowner "may not take his ship away unless the delay is so long as to amount to a repudiation or the frustration of the contract." In the earlier editions of Scrutton this read differently and ended in the sense for which Mr. Roskill contends: "after the lapse of a reasonable time he may take his ship away." Curiously enough, notwithstanding the dictum of Scrutton L.J. in 1917,[13] the text remained in this form until it was altered in 1931 in the 13th edition, for which Mr. Porter and Mr. McNair were responsible. In the latest [16th] edition of Scrutton, p. 93, the text deals with the right of the charterer to cancel in respect of delay in arrival at the port of loading and states that (apart from the common cancelling clause) it is not a condition, but "the delay may be such as to frustrate the commercial purpose of the voyage." This statement is also to be found in the 11th edition, p. 93, the last for which Scrutton L.J. was himself responsible, where it has also the authority of Lord Porter. I can see no ground for drawing any distinction on this point between delay in loading and delay in proceeding on a voyage, since time is not of the essence in either case.

---

[6] (1810) 12 East 381, 389.

[7] (1856) 1 H. & N. 183.

[8] (1831) 8 Bing. 124.

[9] (1843) 5 Q.B. 265.

[10] 1 H. & N. 183.

[11] (1866) L.R. 1 C.P. 643, 648.

[12] (1872) L.R. 7 C.P. 421.

[13] [1917] 2 K.B. 193, 201.

It appears that in the arbitration only the dictum of Scrutton L.J. in *Inverkip Steamship Co. Ltd.* v. *Bunge & Co.*[13] was cited to the arbitrator—there is of course no obligation on the parties to go exhaustively into the law—and no doubt he felt himself free to disregard it on the ground that it was obiter. If the earlier authorities had been cited to him I think he would inevitably have reached the same conclusion as I do.

In *Clipsham* v. *Vertue*[14] the charterer refused to load and pleaded that the vessel did not arrive at the port of loading "within "a reasonable and proper time in that behalf after the making "of the said charterparty; but, on the contrary thereof, the said "vessel arrived at Nantes aforesaid a long and unreasonable time, "to wit 38 days, after the said vessel would have arrived."[15] There was a demurrer to the defendant's plea on the ground that it did not show that by the supposed delay the object of the voyage was lost. The demurrer was upheld. Denman C.J. said[16]: "If "issue had been taken on the term 'unreasonable,' we should "have been required to put a construction upon it; and that, "without further explanation, we have not the means of doing. "It is quite possible that a vessel may arrive in a time which, "in some sense of the word, is unreasonable, and yet that the "freighter may derive benefit from the voyage"; Williams J. said[17]: "The real question is, whether a plea, using only such "expressions as this plea contains, can be supported. I find no "authority in its favour: what is an 'unreasonable' time is left "matter of speculation. To what extent the unreasonableness "went, whether so far as that the voyage was lost, or the cargo "could not be put on board, we are not told."

In *Tarrabochia* v. *Hickie*[18] the jury found that the vessel did not proceed to the port of loading within a reasonable time, but that the object of the voyage was not thereby frustrated. The charterer who had refused to load lost his case.

Stanton v. *Richardson*[19] was one of the early cases in which it was decided that a ship which was unfit for the cargo which she had contracted to load was unseaworthy. The question, however, also arose as to the length of time which would be

[13] [1917] 2 K.B. 198, 201.
[14] 5 Q.B. 265.
[15] Ibid. 269.
[16] Ibid. 272.
[17] Ibid. 269.
[18] 1 H. & N. 183.
[19] L.R. 7 C.P. 421.

necessary to make her fit, and the evidence appears to have been that it would be probably seven or eight months. On this the jury were asked two questions [20]: "11. If the ship was defective, "was the captain willing and able to make her fit in a reasonable "time? 12. Was he willing and able to make her fit within such a "time as would not have frustrated the object of the adventure?" To each of these questions the jury answered: "Willing, but not "able." Bovill C.J. said that the jury, having found that what occurred did wholly frustrate the objects of the voyage, the case came distinctly within the dictum of Lord Ellenborough that a neglect which precluded the defendants from making any use of the vessel would go to the whole consideration and might be insisted on as an entire bar; and he added [21] that the object of the voyage being frustrated the charterer was not bound to load a cargo. Brett J., who had tried the case and given the directions to the jury, said [22]: "the conclusion to be drawn from all the "cases analogous to this is, that if the breach of contract by the "shipowner be such as to justify the charterer in not putting the "cargo on board at the moment of the breach, and it cannot be "remedied within such a time as not to frustrate the object of the "voyage, this absolves the charterer altogether."

While these authorities are in my judgment conclusive, I must not refrain from dealing with arguments on general principle that were advanced by Mr. Roskill for the shipowners. Upon a repudiation by one party, the other has the right to elect to keep the contract alive. So Mr. Roskill argued that the period of delay allowed must not be so long as the life of the contract; otherwise the election would be rendered valueless. This consideration, he submitted, showed that the "frustration" yardstick was inapplicable for two reasons. The first was that, as by the doctrine of frustration a contract is dissolved automatically, whether the parties wish it to end or not, the aggrieved party could not then elect to keep the contract alive. The second was that, even if he could elect, since, ex hypothesi, the object of the parties would have been frustrated, there could be no point in keeping the contract alive.

In my judgment neither of these considerations is valid. The first, I think, confuses the occurrence of a frustrating event with the doctrine of dissolution by frustration. Not every frustrating event brings the contract to an end. The event must have other characteristics, and one of them is that it must not have arisen by the fault of either party. This is clearly shown by *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*[23] In that case the charterers claimed that the refusal of a fishing licence in respect of the trawler which they had chartered frustrated the object of the charterparty and put an end to it. The plea failed because the refusal of the licence had been brought about by the charterers' own fault. The charterparty remained alive and the owners succeeded in their claim for hire.

---

[20] L.R. 7 C.P. 421, 425.
[21] Ibid. 433.
[22] Ibid. 437.

As to the second consideration, it does not follow automatically that because the object of the venture is destroyed, there is no value left in the charterparty. Usually that would be so, and therefore usually no doubt the aggrieved party would wish to rescind. But the rights given to a party under a contract may be wider than the object of the venture requires them to be. It may then be worth a party's while to keep the contract alive for an ancillary purpose and compensate himself by damages for the loss of his main object.

Mr. Roskill next argued that there were ambiguities in the arbitrator's finding which made it unacceptable, at least unless remitted for clarification. He pointed out that the phrase used in the award is: "before the expiry of such time as would "frustrate the charterparty"; and said that the arbitrator must therefore have had in mind the application of the doctrine of discharge by frustration since he referred to the charterparty and not the object of the venture. I do not think that for this purpose it matters if he had. For the purpose of measuring the period of delay, the yardstick is the same whether what is involved is a dissolution or a repudiation.

Mr. Roskill also pointed out that in some of the authorities the "reasonable time" yardstick is used as well as the "frustra-"tion" yardstick. This shows, he submits, that the two are to be regarded in law as one and the same thing, and therefore the arbitrator's findings are contradictory. It is true that in some of the cases, for example, *Geipel* v. *Smith*,[24] to which I shall later refer, a reasonable time is equated with the frustration period. The truth is that there is nothing wrong in using a reasonable time as a yardstick provided you determine what is reasonable by considering whether or not there has been unreasonable delay in the light of the object which the parties had in mind. It is only when the two yardsticks have in effect been shown to be the same that the courts have accepted the test of reasonableness. Where they have been contrasted, as in *Clipsham* v.

---

[23] [1935] A.C. 524.

[24] (1872) L.R. 7 Q.B. 404.

Vertue[25] and *Tarrabochia* v. *Hickie*,[26] the test of reasonable time has been rejected. In the arbitrator's findings the two periods are contrasted and it is clear that whatever he understood to be meant by a reasonable time, it was something less than the period required for frustration, and therefore does not amount to a delay long enough to justify rescission.

Mr. Roskill next argued on this topic that the finding by the arbitrator based on the frustration of the charterparty involved a point of law, because frustration is a question of law, and that in its application the arbitrator must have misdirected himself on the true meaning of frustration and have considered the period to have been longer than the law requires. I think that, while the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact. The period has to be measured, no doubt, in the light of the principles that have been laid down in cases as to the sort of thing that amounts to frustration, but it is in the end a finding of fact. As such it can be successfully attacked only if I am satisfied that the arbitrator could only have reached his conclusion of fact by applying some wrong principle of law. Mr. Roskill does go so far as to submit that the arbitrator, if he had applied the right test, must inevitably have found frustration. On the facts, it seems plain that by July 18 the charterer had got no cargo to ship, and indeed no shipper, and that he was in the position of having within three days of the expiry of the lay days to begin a search for a shipper of a cargo of a commodity which was not easy to find. It can be argued that a contract under which a ship is expected to go and hang about while the charterer negotiates for a cargo is, commercially speaking, a quite different venture from that which the ordinary charterparty contemplates. I think that a strong case could be, and doubtless was, made out by the owners on these lines. The arbitrator may have thought that it was a strong case too; but, if so, he did not think it quite strong enough. I do not find it possible to say that the facts are so strong that the inference of frustration is the only one that can properly be drawn from them. *N. W. Cachar Tea Co.* v. *British & Beningtons Ltd.*,[27] which I cite later on in another connexion, affords an illustration of how a judge can go wrong by interfering with an arbitrator's conclusions on this point unless there is no evidence to support them.

---

[25] 5 Q.B. 265.

[26] 1 H. & N. 183.

[27] (1922) 10 Ll.L.Rep. 381.

Having settled the proper yardstick, the next question that arises for determination could, I think, have been put very conveniently in the form adopted in *Stanton* v. *Richardson*,[28] namely, was the charterer on July 18, 1951, willing and able to load a cargo within such time as would not have frustrated the object of the venture; and the answer to that question would have determined the case. But in the arbitration the main argument was on anticipatory breach, and the emphasis on one mode of it, namely, renunciation. The chief findings of the arbitrator relate entirely to renunciation. I must therefore consider the nature of anticipatory breach and the findings thereon which the arbitrator has made.

The law on the right to rescind is succinctly stated by Lord Porter in *Heyman* v. *Darwins Ltd.*[29] as follows: "The three sets "of circumstances giving rise to a discharge of contract are "tabulated by Anson as: (1) renunciation by a party of his "liabilities under it; (2) impossibility created by his own act; "and (3) total or partial failure of performance. In the case of "the first two, the renunciation may occur or impossibility be "created either before or at the time for performance. In the "case of the third, it can occur only at the time or during the "course of performance."

The third of these is the ordinary case of actual breach, and the first two state the two modes of anticipatory breach. In order that the arguments which I have heard from either side can be rightly considered, it is necessary that I should develop rather more fully what is meant by each of these two modes.

A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating must "evince an intention" not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract. This application is fully discussed in *Forslind* v. *Bechely-Crundall*[30] and forms the basis for the arbitrator's findings.

Of the two modes, renunciation has since the decision in *Hochster* v. *De la Tour*[31] established itself as the favourite. The disadvantage of the other is that the party who elects to treat impossibility as an anticipatory breach may be running a serious risk. Suppose, for example, that a man promises to marry a woman on a future date, or to execute a lease, or to deliver goods; and that before the day arrives he marries another, or executes the lease in favour of another, or delivers the goods to a third party. The aggrieved party may sue at once. "One "reason alleged in support of such an action," Campbell C.J. observed in *Hochster* v. *De la Tour*,[32] "is, that the defendant "has, before the day, rendered it impossible for him to perform "the contract at the day: but this does not necessarily follow; "for, prior to the day fixed for doing the act, the first wife may "have died, a surrender of the lease executed might be "obtained, and the defendant might have repurchased the "goods so as to be in a situation to sell and deliver them to the "plaintiff." But if the plaintiff treats the defendant's conduct as amounting to renunciation and justifies his rescission on that ground, the defendant could not avail himself of this defence.

---

[28] L.R. 7 C.P. 421.

[29] [1942] A.C. 356, 397; 58 T.L.R. 169; [1942] 1 All E.R. 337.

[30] 1922 S.C.(H.L.) 173.

[31] (1853) 2 E. & B. 678.

I said that it was after *Hochster* v. *De la Tour* [33] that renunciation established itself as the favourite, because until then it was not certain that a man who said "I will not perform" would be held to his word. In *Hochster* v. *De la Tour* [33] it was argued that he could change his mind, and that the fact that at one time he said he was not ready and willing did not necessarily mean that he would be unwilling when the time for performance came. *Hochster* v. *De la Tour* [33] established that a renunciation, when acted upon, became final. Thus, if a man proclaimed by words or conduct an inability to perform, the other party could safely act upon it without having to prove that when the time for performance came the inability was still effective.

Since a man must be both ready and willing to perform, a profession by words or conduct of inability is by itself enough to constitute renunciation. But unwillingness and inability are often difficult to disentangle, and it is rarely necessary to make the attempt. Inability often lies at the root of unwillingness to perform. Willingness in this context does not mean cheerfulness; it means simply an intent to perform. To say: "I would "like to but I cannot" negatives intent just as much as "I will "not." In the earlier part of his argument Mr. Mocatta contended that a statement of inability without unwillingness did not amount to a renunciation, but in the end he abandoned the point. He concedes that the arbitrator's conclusion that the charterer evinced an intention not to perform is sufficiently supported by the finding that his attitude was that he was willing to perform if he could, but that he could not. In the other form of anticipatory breach, Mr. Mocatta, as will be seen, contends that the disablement must be deliberate and not negligent or accidental. But to the extent that inability enters into renunciation, Mr. Mocatta is not concerned with the character of the inability. If a man says "I cannot perform," he renounces his contract by that statement, and the cause of the inability is immaterial.

---

[32] 2 E. & B. 678, 688

[33] 2 E. & B. 678.

The two forms of anticipatory breach have a common characteristic that is essential to the concept, namely, that the injured party is allowed to anticipate an inevitable breach. If a man renounces his right to perform and is held to his renunciation, the breach will be legally inevitable; if a man puts it out of his power to perform, the breach will be inevitable in fact—or practically inevitable, for the law never requires absolute certainty and does not take account of bare possibilities. So anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited. In *Thorpe* v. *Fasey*[34] Wynn-Parry J. said[35]: "In "my judgment, when one considers these cases there is neither "any good reason for a distinction nor, in my view, does there "exist any distinction between the nature of the repudiation "which is required to constitute an anticipatory breach and that "which is required where the alleged breach occurs after the "time for performance has arisen." If this is right, it seems to me to dispose in principle of Mr. Mocatta's submission that the disablement must be deliberate. If when the day comes for performance a party cannot perform, he is in breach, quite irrespective of how he became disabled. The inability which justifies the assumption of an anticipatory breach cannot be of any different character. Anticipatory breach was not devised as a whip to be used for the chastisement of deliberate contract-breakers, but from which the shiftless, the dilatory, or the unfortunate are to be spared. It is not confined to any particular class of breach, deliberate or blameworthy or otherwise; it covers all breaches that are bound to happen.

---

[34] [1949] Ch. 649; 65 T.L.R. 561; [1949] 2 All E.R. 393.

[35] [1949] Ch. 649, 661.

I turn now to the findings in the award. The arbitrator finds as a fact, in so far as it be a question of fact, and holds in law, in so far as it be a question of law, that the charterer evinced an intention not to perform the charterparty and committed an anticipatory breach of it. This finding or conclusion is based on 16 findings, in which the arbitrator states his view of the effect of the charterer's conduct on a reasonable shipowner. I think that I can, sufficiently for the purposes of this judgment, summarize the effect of these findings without setting out all 16. In the arbitrator's judgment, the owners should on July 18 have inferred from the charterer's conduct: (1) that he was always willing to perform if he could; (2) that he could not have performed by the end of the lay days or within a reasonable time thereafter; and (3) that he could have performed before the delay became so long as to frustrate.

This third finding is, however, to be qualified by a fourth, which is that if the shipowner was entitled to interpret what he knew of the charterer's conduct on July 18 in the light of later events, he would then have concluded that the charterer would *not* be able to perform before the delay had become so long as to frustrate.

For the arbitrator to have awarded as he did in favour of the owners, he must have adopted as correct and relevant either the second or the fourth of these findings. In fact, he states that he rejected the fourth finding as irrelevant, and so must have found for the owners on the second finding. As I have held that the second finding is irrelevant in law, the owners can succeed before me on renunciation only if they satisfy me that the arbitrator was wrong in rejecting the fourth finding.

In my opinion the arbitrator was right. Indeed, I do not really know what is meant by interpreting conduct in the light of later events. I think that the question or the finding embodies a confusion between the principle illustrated by *Forslind* v. *Bechely-Crundall*[36] and that laid down in *The Savona*[37] and *Embiricos* v. *Sydney Reid & Co.*,[38] and which is most fully formulated by Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co.*[39] as follows: "The question must be considered at the trial as it "had to be considered by the parties, when they came to know "of the cause and the probabilities of the delay and had to "decide what to do. On this the judgments in the above cases

---

[36] 1922 S.C.(H.L.) 173.

[37] [1900] P. 252.

[38] [1914] 3 K.B. 45; 30 T.L.R. 451.

[39] [1919] A.C. 435, 454; 35 T.L.R. 150.

"substantially agree. Rights ought not to be left in suspense "or to hang on the chances of subsequent events. The contract "binds or it does not bind, and the law ought to be that the "parties can gather their fate then and there. What happens "afterwards may assist in showing what the probabilities really "were, if they had been reasonably forecasted, but when the "causes of frustration have operated so long or under such "circumstances as to raise a presumption of inordinate delay, "the time has arrived at which the fate of the contract falls to "be decided."

The *Forslind* case[40] is based on the simple and well-known principle that a man may speak by his deeds as well as his words. It is not peculiar to anticipatory breach; a contract can. for example, be made by conduct as well as be broken by it. Lord Sumner's principle is a device by which for commercial purposes a man may be entitled to act on information which he has and be protected even if it turns out to be unreliable or untrue. It depends on likelihood and a forecast of future events. But conduct, it seems to me, can only be interpreted in the light of the events that are known to the interpreter at the time.

Even if Lord Sumner's principle applied, Mr. Roskill rests too much on the words "what happens afterwards may assist." This does not, in my judgment, mean that a forecast, which appeared to be the most reasonable one at the time, may be revised in the light of after events and the revised version prevail. It means simply that if there is a question as to which of two forecasts seemed at the time to be the better one, the knowledge of what happened afterwards may assist the judge in making his choice between them.

Finally on this point, Mr. Roskill submitted that he had got a finding of anticipatory breach, that there was evidence to support it and that that ended the matter. He, too, claimed that he was in a better position with a finding of anticipatory breach than he would have been with a similar finding of actual breach, and with that argument I have already dealt. It is true that the finding is in Mr. Roskill's favour and that the evincing of an intention is a question of fact. But Mr. Mocatta successfully attacks that finding if he can show that there is necessarily involved in it an error of law. In the light of the findings in paragraph 34, and for the reasons I have given, I think he can show that it must be based on an erroneous concept of the length of delay necessary to amount to a repudiation; and so the finding cannot stand. This means that Mr. Roskill's case on renunciation fails and that he must rely on the other side of anticipatory breach. That brings one back to the question: Was the charterer, whatever interpretation be put on his conduct, in fact willing and able to perform?

---

[40] 1922 S.C.(H.L.) 173.

The arbitrator has not found facts which constitute a direct answer to this question. But Mr. Roskill submits that he has found facts which, taken together, amount to an answer, and that the answer is "Willing but not able." This alleged finding, which is crucial to Mr. Roskill's case on the point, is disputed by Mr. Mocatta; he says it is not to be found in the award. This dispute has led to a lot or argument and detailed examination of various parts of the award, and also to a motion to remit made by Mr. Roskill in case he was wrong and Mr. Mocatta was right. It is inconvenient to interrupt the argument to deal with these points now. I shall continue it on the assumption that Mr. Roskill has got or gets the finding he wants. Mr. Mocatta, as I have already indicated, submits that this finding, if Mr. Roskill has it, is irrelevant. He submits that the only sort of inability that would, standing by itself, be of use to Mr. Roskill is inability deliberately created by the charterer, i.e., by the doing of an act which he knew at the time would disable him from performing his contract. There is no suggestion of an act of this character, and it would, of course, be inconsistent with the finding of willingness.

I have already given reasons for thinking that, if I have rightly understood the nature of anticipatory breach, Mr. Mocatta's argument is unsound in principle. I turn now to consider how it stands on the authorities. Lord Porter's statement of the law,[41] to which I have referred, uses the term "created by his own act." I see no reason for reading any limitation into those words. I think that the law on this point is correctly stated by the editors of Smith's Leading Cases, 13th ed. (1929), vol. 2, p. 40, in the following terms: "A party is "deemed to have incapacitated himself from performing his side "of the contract, not only when he deliberately puts it out of his "power to perform the contract, but also when by his own act "or default circumstances arise which render him unable to "perform his side of the contract or some essential part thereof."

The first authority cited for this proposition is *Keys* v. *Harwood*.[42] In this case the defendant had undertaken to deliver certain furniture, but before he could do so a judgment creditor took the furniture in execution. The defendant's inability to perform was clearly not due to his own deliberate act, but nevertheless he was in default. Tindal C.J. said that the case was to be considered as if the defendant had himself taken away the furniture and sold it. Other examples can be found in the insolvency cases, since insolvency which renders a man unable to meet his commitments can hardly be created by a deliberate act. But the cases on insolvency are not clear cut. The way in which a party learns about insolvency is usually by the conduct of the other party and this necessarily introduces the question of whether that conduct amounts to renunciation. But I must deal with two insolvency cases upon which Mr. Mocatta much relied: *In re Agra Bank*[43] and *In re Phoenix Bessemer Steel Co.*[44] In the former case it was held that the suspension of payment by a bank was not an anticipatory breach of its obligations under a letter of credit which the bank had issued. The case is simply a decision on the facts that the suspension of payment was not sufficient proof that the bank would not accept the bills or that they would not be able to do so. But Page Wood V.-C. states the relevant principle in terms which I respectfully adopt and which appear to me to be contrary to Mr. Mocatta's argument. He says[45]: " I consider the principle of those cases to be simply " this—that if a man by his own act renders it impossible for him " to perform the contract, or if he distinctly and decidedly " repudiates and rejects the contract, even though the time of its " performance has not arrived, and it may be said, as was said " in the courier's case, that there is still time for repentance, " then the contract is broken, and a remedy may be had in " damages." And, again, he says[46]: " The only question is, " have the bank refused to complete the contract, or disabled " themselves from completing it? "

---

[41] [1942] A.C. 356, 397.

[42] (1846) 2 C.B. 905.

In the later case[47] a company which had an obligation to accept and pay for goods in monthly instalments called a meeting of its principal creditors to ask for an extension of credit on existing contracts. The principle was put by Jessel M.R. as follows[48]: " As I understand the decisions, where there has been " actual insolvency or a declaration that the purchaser does not

---

[43] (1867) L.R. 5 Eq. 160.

[44] (1876) 4 Ch.D. 108.

[45] L.R. 5 Eq. 160, 164.

[46] Ibid. 166.

[47] *In re Phoenix Bessemer Steel Co.*, 4 Ch.D. 108.

[48] Ibid. 112.

1957

UNIVERSAL CARGO CARRIERS CORPORATION
v.
CITATI.

Devlin J.

"choose to pay, the vendor is not bound to deliver without the "cash."

The Master of the Rolls and the Court of Appeal held that on the facts there was no repudiation. I cannot find anything in the judgments which says that insolvency by itself without the declaration of it would not have been enough. In the circumstances of the case the judgments were not concerned to distinguish between the two, and where the point is not in issue it is not in my opinion legitimate to pick out references, such as that of Bramwell L.J.[49] to "avowed inability," and to submit that "inability" is no use unless "avowed."

The truth is that there is little or no authority directly in point because it is very difficult to find a case in which the point is clearly raised. Whenever the inability is manifested by something that a party does, the other party will rely upon renunciation by conduct rather than upon impossibility, because renunciation is so much easier to establish. If he does not rely solely upon renunciation, at least he will not exclude it, and it is then unnecessary in the judgment to distinguish between renunciation and impossibility. Even in a case like *Stanton* v. *Richardson*,[50] where renunciation is not mentioned at all and where the inability was clearly not caused by a deliberate act, it is possible for Mr. Mocatta to argue, as he does (though not, I think, very convincingly), that the conduct of the owner in failing to provide a ship that could be made seaworthy before frustration amounted to a renunciation. In short, it is impossible to get a clear case unless inability is concealed or for some reason not appreciated by the rescinding party at the time when he acts. In that event can the rescinder, having rescinded for the wrong reason, perhaps because he misinterpreted the conduct of the other side, justify his action by relying on facts which come to his knowledge thereafter and with the aid of which he can prove inability? It is now well settled that a rescission or repudiation, if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason.

N.B.

It so happens that one of the leading authorities which established this principle is also on the point which I am now considering. In *British & Beningtons Ltd.* v. *N. W. Cachar Tea Co.*[51] a contract was made in September, 1919, for the sale of a quantity of 1919–1920 crop of Indian tea. It was agreed between the parties at the arbitration (see the report in the Court of Appeal [52]) that the contract required delivery in bonded warehouse in London. No time for delivery being prescribed, it followed that the contract required delivery within a reasonable time. Shipment was made in good time, but, owing to congestion in the Port of London, the ships were diverted by the Shipping Controller to various other ports, and the cargoes were discharged there in February and March, 1920. Negotiations took place between the parties for delivery to be taken at these other ports, but they resulted only in an unenforceable agreement. In July, 1920, the buyers wrote saying that, as the goods were not yet delivered in London as promised by the contracts, the latter were null and void. At the arbitration the buyers argued that they were entitled to cancel the contract because by July, 1920, a reasonable time for the delivery of the tea had expired. The arbitrator held that a reasonable time had not then expired and awarded damages to the sellers.

---

[49] 4 Ch.D. 112, 122.

[50] L.R. 7 C.P. 421.

[51] [1923] A.C. 48.

When the award was considered by McCardie J.[53] the buyers argued that the contract was frustrated on the ground that the action of the Shipping Controller had imposed a delay which made it impossible for the sellers to deliver within a reasonable time. Since the arbitrator had found that, notwithstanding the delay imposed by the diversion, a reasonable time had not expired, it could not be contended, if that finding stood, that the contract had been discharged by frustration. McCardie J. in effect disregarded that finding and held that the doctrine of frustration applied and that the award should be set aside. His judgment was reversed in the Court of Appeal, which held that he had no power to interfere with the arbitrator's decision on what amounted to a reasonable time.

In the Court of Appeal [54] the buyers also argued frustration on a different ground; they argued that the contract upon its true construction required that the tea must be shipped direct to London and be there delivered ex bonded warehouse. Since the goods had before the date of cancellation been discharged in other ports, this term could not in any event have been fulfilled. Bankes L.J.[55] dealt with the point by holding that that was not the right construction of the contract. Scrutton L.J. dealt with it [56] by holding that the buyers, having refused to take delivery on a wrong ground, might not at the hearing put it on the right ground. He said that the effect of *Braithwaite* v. *Foreign Hardwood Co.*[57] was that the sellers were relieved, by the acceptance of repudiation on a wrong ground, from any further performance of the contract.

---

[52] 10 Ll.L.Rep. 381.

[53] 8 Ll.L.Rep. 220.

[54] 10 Ll.L.Rep. 381.

[55] Ibid. 383.

[56] Ibid. 387.

In the House of Lords Lord Sumner[58] rejected the reasoning of Scrutton L.J., holding that *Braithwaite's* case[59] either did not lay down that proposition or, if it did, was wrong. He said[60]: "I do not think that the case, as reported, lays it down that a "buyer, who has repudiated a contract for a given reason which "fails him, has, therefore, no other opportunity of defence either "as to the whole or as to part, but must fail utterly. If he had "repudiated, giving no reason at all, I suppose all reasons and "all defences in the action, partial or complete, would be open "to him. His motives certainly are immaterial, and I do not "see why his reasons should be crucial. What he says is of "course very material upon the question whether he means to "repudiate at all, and, if so, how far, and how much, and on "the question in what respects he waives the performance of "conditions still performable in futuro or dispenses the opposite "party from performing his own obligations any further; but I "do not see how the fact, that the buyers have wrongly said "'we treat this contract as being at an end, owing to your "'unreasonable delay in the performance of it' obliges them, "when that reason fails, to pay in full, if, at the very time of this "repudiation, the sellers had become wholly and finally disabled "from performing essential terms of the contract altogether. "*Braithwaite's case*[61] says nothing, which affects the regular "consequences, when it appears that at the time of breach the "plaintiff is already completely disabled from doing his part at "all." Lord Sumner then proceeded to examine the point, and held that there was not in fact an obligation to ship direct to London and therefore that the argument did not prevail. It is plain that the inability to deliver was due to circumstances beyond the sellers' control and could not possibly be described as a deliberate act of disablement. But no point of that sort occurred to Lord Sumner, and it is clear that if he had found that there was a disablement of the character he was examining he would have regarded it as a good defence. This part of his speech was obiter, but the speech received the general concurrence of three others of their Lordships and has always been followed as an illuminating statement of the law.

---

[57] [1905] 2 K.B. 543; 21 T.L.R. 413.

[58] [1923] A.C. 48, 70.

[59] [1905] 2 K.B. 543.

[60] [1923] A.C. 48, 71.

[61] [1905] 2 K.B. 543.

I think, therefore, both principle and authority, so far as it goes, are against Mr. Mocatta's argument. The argument is worth testing also in the light of what is just and reasonable. Suppose, for example, that in this case the time allowed for the lay days had been of the essence of the contract. The shipowner sails away three days before the expiry of the lay days relying upon an anticipatory breach. It is manifest that the loading could not have been completed by the end of the lay days. I do not see why the shipowner should not succeed simply by proving that fact, without having to go into questions of how the charterer conducted himself and what the effect of that conduct would be on the mind of a reasonable shipowner. If the charterer was continuing to assert, wildly and optimistically, that he could and would complete the loading, although everyone else knew it to be impossible, would that amount to renunciation? If not, would the shipowner be obliged to wait? I can see no good reason why a party's right to claim an anticipatory breach should depend simply on whether his adversary is artful enough to conceal his state of mind or obstinate enough not to admit his inability. Take another example from the facts of this case. The shipowner might say that it was plain to him on July 18 that the charterer could not get a cargo for at least a fortnight and that so long a delay defeated the charterparty. The arbitrator might say that he quite agreed that it was plain on July 18 that the charterer could not get a cargo for at least a fortnight, but that he could not agree that such a delay would defeat the charter; the charterer in his opinion ought to have been given a month. Surely the owner is entitled to say: "As "it has turned out, he could not have got a cargo even in a "month, so the difference between us does not matter."

In my judgment, therefore, if the owner can establish that in the words of Lord Sumner [62] the charterer had on July 18 "become "wholly and finally disabled" from finding a cargo and loading it before delay frustrated the venture, he is entitled to succeed. Lord Sumner's words expressly refer to the time of breach as the date at which the inability must exist. But that does not mean, in my opinion, that the facts to be looked at in determining inability are only those which existed on July 18; the determination is to be made in the light of all the events—whether occurring before or after the critical date—put in evidence at the trial. Apart from the special principle illustrated in *Bank Line Ltd.* v. *Arthur Capel & Co.*,[63] that is the usual mode of proof, Here again, there is not much authority in cases dealing with anticipatory breach for the same reason, namely, that the vast majority deal with renunciation. But enlightenment is, I think, to be obtained from looking at some of the earlier cases on the application of the doctrine of frustration. In these cases, of course, the doctrine of renunciation plays no part. Take, for example, *Geipel* v. *Smith*.[64] The owners refused to load a cargo because Hamburg, the port of discharge, was under blockade and they contended that the performance of the contract was prevented by an excepted cause, namely, restraint of princes. The court held that as the blockade had lasted for more than a reasonable time (I think they must be treated as equating a reasonable time with such time as would frustrate the object of the venture), the shipowner was justified in throwing up the contract. Cockburn C.J. said [65]: "the defendants rest their "defence on the ground that it was here impossible to expect, "from the nature of the circumstances, that the obstacle of the "blockade would be removed within a reasonable time. It is a "sufficient answer on the defendants' part that it was not likely "to be removed within a reasonable time; and assuming that "either party was bound to wait a reasonable time to ascertain "whether the obstacle would be removed, in point of fact it was "not so removed, and the defendants were therefore justified in "not attempting to perform their contract." Blackburn J. said [66]: "the defendants say, 'We are not going to let our "'ship sail to the port of loading at all, because you, the plain"'tiffs, never will be ready and willing to perform your part of "'the contract.' But then it is said, it is possible the blockade "might be raised within a reasonable time. No doubt it was "possible. But it must be taken on this record that it was not "raised within a reasonable time; so if the defendants chose to "run the risk, and in the event turn out right, they are in the "same position as if they had waited the reasonable time and "had then sailed away." In these citations it will be seen that Cockburn C.J. thought that it would be a sufficient answer for the defendants to say that the blockade was not likely to be removed. This is the answer that has subsequently been taken up and developed by *Embiricos* v. *Sydney Reid & Co.*[67] and *Bank Line Ltd.* v. *Arthur Capel & Co.*,[68] and is now, I think, to be treated as the right answer in cases to which the doctrine of frustration applies. The other answer, however—and the only answer that Blackburn J. gave—embodies the ordinary rule, and in my opinion is applicable to cases of anticipatory breach.

---

[62] [1923] A.C. 48, 72.

---

[63] [1919] A.C. 435.

[64] L.R. 7 Q.B. 404.

[65] Ibid. 411.

[66] Ibid. 413.

More authority of the same sort may be found in those cases which exemplify the equitable doctrine of making time the essence of the contract. If a party rescinds without giving reasonable notice thereby making time of the essence, he is in the same position as one who acts before a reasonable time has expired. In *Thorpe* v. *Fasey*,[69] in the passage I have already cited, Wynn-Parry J. said [70]: "It is true that in the present case the plaintiff "did not, as he could have done, make time of the essence of the "contract. That is not fatal to his case, if he can demonstrate "that the evidence discloses that the defendant is unable or "unwilling, whatever time is given, to perform his contract."

I considered the same sort of point in *Etablissements Chainbaux S.A.R.L.* v. *Harbormaster Ltd.*,[71] on which Mr. Roskill relied. In this case there was an obligation on the buyers who undertook to furnish a letter of credit; they failed to do so within the contract time; the sellers extended the time and then cancelled without giving a reasonable notice of their intention to do so. The position at the date of cancellation was, although the sellers did not know it, that the buyers could not have furnished a letter of credit within any reasonable extension of time. I said [72]: "Does it make any difference that the defendants did "not know what we now know to be the true facts? In my "judgment, it does not. Defendants who act as these defendants "did no doubt run a considerable risk; they run risks that they "will not be able to discharge the burden, which I think is upon "them, of proving affirmatively that if they had given a reason-"able notice the other side could not have complied with it; but "in this case I think that the defendants do discharge that "burden. The evidence shows quite clearly that any reasonable "extension of time such as I might have been willing to fix in "other circumstances, such as 14 days or another month at the "most, would not have availed the plaintiffs at all . . . when "the facts disclosed that, that is a good enough justification for "the defendants' attitude." In my judgment in this case I referred to the authorities which seemed to me to support my conclusion and I need not cite them again here.

---

[67] [1914] 3 K.B. 45.

[68] [1919] A.C. 435.

[69] [1949] Ch. 649.

[70] Ibid. 661.

[71] [1955] 1 Lloyd's Rep. 303.

[72] Ibid. 314.

I said earlier that Mr. Mocatta did not contend that the principle in *Embiricos* v. *Sydney Reid & Co.*[73] and *Bank Line Ltd.* v. *Arthur Capel & Co.*[74] applied in cases of anticipatory breach. But I think perhaps that I ought to say why, because during a large part of his argument he did appear so to contend; and the question was discussed whether the arbitrator ought to be asked to make a finding of fact on that basis. Such a finding of fact would be about the expectation of reasonable and well-informed men on July 18 as to whether a cargo could be found without a delay long enough to defeat the charter. The arbitrator has found what conclusion a reasonable shipowner would have drawn from the facts known to him on that day. It does not, however, necessarily follow that the well-informed man who might be credited with a wider knowledge of the facts would have necessarily drawn the same conclusion. In the end Mr. Mocatta made no request for this finding and abandoned the point, I think rightly. Questions of breach of contract are not to be determined on the principle of *Embiricos* v. *Sydney Reid & Co.*[75] Speaking of this principle, as laid down by Scrutton L.J.,[76] I said this in *G. W. Grace & Co.* v. *General Steam Navigation Co.*[77]: "That "principle is at least as old as the conception of constructive total "loss, but it is one to be applied with discrimination. It involves "the court in proceeding on an erroneous estimate of the facts "and probabilities for, if the estimate is not erroneous, no point "arises. That course can be taken only when it serves the "important commercial purpose indicated by Scrutton L.J. "When a claim for damages is being considered, the event has "happened and need no longer be forecast. The right to damages "depends on a wrong done and an injury actually sustained, not "on someone's estimate of whether a wrong is likely to be done "or an injury likely to be sustained. A master is not to be "deprived of his remedy because, in ignorance of the danger, he "entered a port which well-informed men might erroneously "have pronounced to be safe; nor is he to be given damages if "he sustains injury in conditions which fall short of the danger-"point merely because well-informed men might have erroneously "pronounced his entry into the port to be foolhardy. In my

---

[73] [1914] 3 K.B. 45.

[74] [1919] A.C. 435.

[75] [1914] 3 K.B. 45.

[76] Ibid. 54.

[77] [1950] 2 K.B. 383, 393; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201.

"judgment, the arbitrator, being concerned only with a claim "for damages for injury to the ship, rightly proceeded on the "view which he formed of the true facts."

I think that this is the right view. An anticipatory breach must be proved in fact and not in supposition. If, for example, one party to a contract were to go to another and say that well-informed opinion on the market was that he would be unable to fulfil his obligations when the time came, he might get the answer from his adversary that the latter did not care to have his affairs discussed on the market and did not choose to give any information about them except the assurance that he could and would fulfil his obligations. If that assurance was rejected and the contract rescinded before the time for performance came and the assurance in fact turned out to be well-founded, it would be intolerable if the rescinder was entitled to claim that he was protected because he had acted on the basis of well-informed opinion.

For all these reasons I have come to the conclusion that if Mr. Roskill can produce out of the award a finding that on July 18 the charterer was unable to load a cargo within such a time as would not have frustrated the object of the venture, the owners would be entitled to succeed, notwithstanding that that was not a conclusion which they would have been justified in drawing from the facts known to them at the time. I pass therefore to deal with a group of submissions by Mr. Mocatta on this point. They are: (1) The point is not open to Mr. Roskill anyway because it was not argued in the arbitration; (2) That there is no finding of fact on which the point can now be made good; and (3) That it is not a case in which the award ought to be remitted for such a finding to be made.

I shall begin by stating what appear to me to be the general principles in the light of which these three submissions should be considered.

The question of law for my decision is stated in the award in the customary phraseology: "Whether upon the facts found "and upon the true construction of the charterparty the "claimants [the shipowners] were entitled on July 18, 1951, to "treat the charterparty as discharged by the respondent's breach "and to claim damages accordingly." When the question of law is left in this general form, a party is entitled to argue any point of law that arises on the facts found. The purpose of arguing the law before the arbitrator—and the only useful purpose, as far as I can see, once it becomes clear that a case is to be stated—is to enable him to know what facts to find as relevant to the points of law which the parties are taking. It is the duty of each party, when he gets the case stated, to consider it and satisfy himself that the relevant facts are found. If they are not, he should apply to the court within the six weeks allowed by R.S.C., Ord. 64, r. 14, to have the case remitted for the findings he wants. If the relevant facts have not been stated, it must, strictly speaking, be the fault either of the party for failing to make his point properly or of the arbitrator for failing to apprehend it. I say " strictly speaking " because there may be cases of complexity where it is difficult to put the blame on anybody. If, however, it is the fault of the arbitrator, the applicant is, I think, entitled to remission almost as of right; if it is his own fault, he must ask for indulgence. The court must then exercise its discretion, which is a wide one.

The importance of making an application in time is two-fold. It may be a case which it is best to remit at once before the argument of law begins. If it is not, and if the court thinks that time and money may be saved by first hearing the argument, the result of which may make the remission unnecessary, the application will nevertheless make it clear beyond doubt that the applicant's grievance was one which occurred to him at once on reading the case, and that the point of law is not an afterthought which arose for the first time during the hearing of the argument. If the application is not made in time and the applicant has to ask for an extension, he must, I think, not only explain the delay, but also show " a strong case on the merits " indicating a really definite issue for consideration "; *per* Scott L.J. in *Temple Steamship* v. *Sovfracht.*[78]

Under the Arbitration Act, 1950, section 22, the court has the power to remit of its own motion without any application being made. The existence of this power, and the fact that it has not infrequently had to be used, has, I believe, led parties to think that there is no need—except when the award is so deficient as to make argument impossible—to take the initiative in making an application; and that it is better to wait and see how the matter develops at the hearing. For my part, I am not prepared to use this power unless I find that I cannot deal with the matter justly on the material provided. Remission is a step which a court is slow to take because there is no merit at all in arbitrations unless awards are to be treated, if at all possible, as final on the facts. The court does not expect all awards to be perfect and will not remit them merely for minor clarifications. Mr. Roskill invited me to use this power in respect of three points (none of them the subject of his later application) and I have declined to do so. I think that Mr. Mocatta is also right in submitting that the power ought not to be used to assist one side rather than the other and certainly not to relieve a party of the consequences of not making in time an application which he ought to have made.

---

[78] (1943) 76 Ll.L.Rep. 35, 36.

In *Hudson's Bay Co.* v. *Domingo Mumbru Sociedad Anonima*[79] the Court of Appeal held that where the umpire stated the facts as he found them and then asked the court, not a question as to a specific point of law, but generally to say whether having regard to the facts as found the one party or the other was in the right, the parties are entitled to take any questions of law that arise upon those facts. In my judgment this decision applies only to clear and conclusive findings and not to incidental or narratory findings. Although the question of law is here stated in a general form, it is quite clear that the arbitrator regarded his conclusion as turning on the question of whether or not an intention had been evinced to renounce the contract; and I do not think it would be right to make too much of findings set out in the course of the narrative, which he could not have thought to be material to the points of law which the parties were really arguing.

In this connexion it is not, I hope, out of place for me to comment upon a form of award that appears to me to be in a new style. The award in this case consists of 46 pages of foolscap; and another that I have had before me this term, also by a legal arbitrator, was of the same length. Both these documents are cast as judgments rather than awards; they set out the evidence in extenso with the views and comments of the arbitrator on it and on the matters of law discussed. The Court of Appeal has several times said that arbitrators ought not to annex bundles of correspondence to their awards, and I think the same principle applies to extended narratives of evidence. Strictly speaking, a case stated should contain nothing but findings, positive or negative, of fact. In practice, it is always necessary to include some explanatory matter, but it should, I think, be kept to a minimum; its purpose being simply to make the findings easily intelligible. The award in this case would be admirable if the court had full appellate jurisdiction or even had power to draw an inference of fact, but it has not. Unless the question is whether there is any evidence to sustain a finding, the court is not concerned with the evidence, nor with the processes by which the arbitrator arrived at his inferences or conclusions of fact. The effect of setting out the evidence may conceivably be to cause the judge to entertain doubts, which he ought not to entertain, about the value of the findings and almost certainly will be to allow the argument at the hearing to range much more freely than it ought to. No doubt the reason that lies behind this type of award is that the arbitrator wants to give the parties as good a run as he can at the hearing of the argument. But that is not, in my opinion, the proper object of arbitral proceedings, which is to cut out all further argument on questions of fact; and that object should be achieved as firmly and concisely as possible.

---

[79] (1922) 10 Ll.L.Rep. 476.

Another disadvantage about this type of case stated—and the one that is material to the point I have to decide—is that it is very difficult to make sure how much of it is meant to be a firm finding of fact and how much merely narrative or disputable evidence. When, for example, the arbitrator sets out information given in correspondence, does he mean to find that the information is true or just that it was given? The paragraph of the case which opens with " I find the following facts," is qualified in many places by phrases such as " the evidence points " strongly to." However, the findings of fact on which Mr. Roskill principally relies are unqualified. They contain much material from which an inference about the charterer's inability to ship might be made, but the inference is not drawn. In paragraph 20 an inference about inability is drawn, but is limited in scope (it relates to the option); it is based, perhaps, on the absence of evidence (whereas it may be contended that it is for the owners to call evidence proving inability); and it is, or may be said to be, qualified by the expression " in my view."

I do not overlook the consideration that there is a specific finding about what a reasonable shipowner would conclude " on " the facts known to him by July 18, 1951, as interpreted in the " light of subsequent events "; and that it is in Mr. Roskill's favour. As I have already said, I do not know precisely what this means. All that is clear about it is that it is directed to renunciation and not to proof of impossibility. On the whole, I have come to the conclusion that, while there are many indications of how the arbitrator had looked at the matter and, " a strong case on the merits indicating a very definite issue for "consideration" (I need say no more than that), there is no clear and conclusive finding on this point; and the reason why there is no such finding is shown well enough by the form of paragraph 34, which makes it clear that at the arbitration the parties were arguing about renunciation and not about impossibility in fact. I must, therefore, hold that Mr. Roskill cannot argue the point on the case as it stands; and that, subject to his application that the award should be remitted to the arbitrator for a specific finding of fact, the owners must lose on the argument before me.

In these circumstances ought I to refuse Mr. Roskill's application? On the whole, and not without much hesitation, I have come to the conclusion that the owners ought not to be barred altogether from taking this point, and that they can now be allowed to do so without injustice to the charterer. I extend the time for this application to be made, but do not wish it to be treated as any sort of a precedent; nor do I modify the view that I have already expressed in general about the duty of parties to examine awards for supposed defects or to offer an adequate explanation if they have failed to do so. I shall grant both applications on terms. In the first place, I shall not allow the result of the remission to affect the costs of the hearing which have been incurred to date. As the case stands, the charterer is entitled to succeed and therefore he must have the costs of the hearing to date. In the second place, I think that he is entitled to have the costs that may further be incurred in the arbitration as the result of the remission. If the point had been taken during the original hearing before the arbitrator, the probability is that it could have been disposed of then without increasing the costs of the arbitration, as they may be in consequence of a further hearing. I do not make an unqualified order about this, as it may conceivably turn out that the additional hearing before the arbitrator is one which might have substantially increased the length of the arbitration anyway.

In the result, therefore, I have reached a decision on a point of law which is not before me. To be strict, I should have remitted the award to the arbitrator for the further finding of fact; and if he made the finding in favour of the charterer, the point of law about the nature of the disablement that justifies rescission would not arise. But the point having been fully argued before me, I have thought it right to express my conclusion on it, because I think that thereby I may save the parties the cost of further argument before me. If the further finding of fact is in the charterer's favour, the award will stand. If it is in the owners' favour, I shall uphold the alternative award, subject to any fresh award the arbitrator may see fit to make on the question of costs. I expect, therefore, that when the remitted case comes back to this court, I shall be able to give the appropriate judgment without hearing further argument.

On application by owners for remission, ordered, on owners undertaking to pay costs of remission unless court otherwise directs, that time for application be extended, that award be remitted to arbitrator (1) *to answer question whether the charterer was on July* 18, 1951, *willing and able to perform the charterparty within such time as would not have frustrated the commercial object of the adventure, and* (2) *to reconsider his award of costs. Leave to appeal from this order.*

Solicitors: *Holman, Fenwick & Willan; Constant & Constant.*

E. M. W.

HALL *v.* MEYRICK.

[1954 H. 1616.]

1956
Nov. 22, 23, 28;
Dec. 18, 21.

Ashworth J.

C. A.

1957
June 20, 21.

Hodson, Parker and Ormerod L.JJ.

Solicitor—Negligence—Will—Solicitor instructed by man and woman to draft wills conferring benefits on each other—Jocular reference to possibility of marriage—Subsequent marriage of clients—Failure of solicitor to advise on revocation of wills by subsequent marriage —Consequent loss by client of benefits conferred on her by man's will—Duty of solicitor.

Practice—Pleadings—Statement of claim—Amendment setting up new cause of action—Defendant deprived of defence under Statute of Limitations, 1939 (2 & 3 *Geo.* 6, *c.* 21)*—Rule of practice.*

Practice—Order—Recall—Order not drawn up—Amendment of pleading.

In 1949, the plaintiff and one H., whom she subsequently married, instructed the defendant, who was a solicitor, to draft wills whereby each was to confer benefits upon the other. Although the possibility of a marriage was indicated at the interview by the plaintiff's son in a jocular manner, the defendant failed to advise that marriage would revoke the wills, unless they were expressed to be made in contemplation thereof. The wills which were executed were not in this form. The plaintiff married H. in 1950, and the wills were revoked by operation of law. Neither the plaintiff nor H. was aware of the effect of the marriage upon their wills. H. died intestate in 1952. In an action against the defendant the plaintiff claimed damages for the loss of the benefits which had been conferred on her by her husband's will, alleging that the loss was due to the negligence of the defendant in his professional capacity as her solicitor, in failing to advise as to the effect of a marriage on the wills in 1949, and in failing to inform her in 1950, when he was informed of the marriage, and in 1952, when the plaintiff made a new will, that the wills of 1949 had been revoked.

The statement of claim alleged that in November, 1949, she and H. had jointly "retained and employed the defendant as their "solicitor to advise them in making mutual wills in contemplation "of marriage." Ashworth J., having rejected this claim, indicated that he would allow the plaintiff to amend by substituting the allegation that there had been, alternatively, a separate retainer of the defendant by the plaintiff.

Objection to the amendment formulated was later taken by counsel for the defendant on the ground that it set up an entirely different contract and fresh claims in respect of causes of action which, since the issue of the writ, had been barred by the Statute of Limitations.

Ashworth J., feeling obliged, in fairness to the parties, not to resile from his previous decision, accepted the amendment:—

Held by Ashworth J., (1) that the defendant had been negligent and in breach of duty to his client, the plaintiff, in 1949, in failing to advise that a marriage between the plaintiff and H. would have the effect of revoking the wills which he had been instructed to draft.

Griffiths v. *Evans* [1953] 1 W.L.R. 1424; [1953] 2 All E.R. 1364 distinguished.

(2) That the defendant had not been in breach of duty to her in 1950, when he was informed of the marriage, nor in 1952, when the plaintiff made a new will, in failing to advise the plaintiff that the wills had been revoked by marriage.

(3) That, although the term negligence had been used, the claim was in effect a claim for damages for breach of contract (*Groom* v. *Crocker* [1939] 1 K.B. 194; [1938] 2 All E.R. 394; 54 T.L.R. 861 applied), and, therefore, the rule in *Hadley* v. *Baxendale* (1854) 9 Exch. 341 was applicable to test remoteness of damage. The claim fell within both heads of that rule. The plaintiff's lack of knowledge of the effect of marriage and consequent absence of occasion to persuade H. to make a new will were the direct and natural result of the defendant's breach of contract; alternatively, if the defendant had contemplated the effect of his breach he would have realized that he would be depriving the plaintiff of a chance of recovering for herself the benefits which she would, but for the marriage, have gained from the will of 1949. Accordingly, the damage was not too remote.

(4) That, although the existence of a number of contingencies affecting the plaintiff's claim did not render the damage too remote,

they must be considered in assessing the quantum of the plaintiff's claim. If, however, there was a reasonable chance of their being satisfied in a manner favourable to the plaintiff the amount by which the claim fell to be discounted was to be correspondingly reduced.

Held on appeal, (1) that under the general rule of practice as to the amendment of statements of claim a plaintiff would not be allowed to amend by setting up fresh claims in respect of causes of action which, having regard to the date of the issue of the writ, had been barred by the Statute of Limitations.

Weldon v. *Neal* (1887) 19 Q.B.D. 394 applied.

(2) That unless and until an amendment has been put into writing and submitted to the other side, and the other side has had an opportunity of making submissions upon it, anything that the trial judge has said must be in the nature of a provisional view, and not a final ruling. His discretion as to reversing his order is completely unfettered. Even if the trial judge had intended to give a final ruling, it was always open to him, until the order was drawn up, to change his mind.

Per curiam. It is not the duty of a solicitor in all cases to draw the attention of persons, who come into his office to draw wills, to the effect of marriage on a will; each case depends on its particular facts.

Per Ormerod L.J. It would be the duty of a solicitor in such circumstances to advise on the effect of subsequent marriage on the will if the client told him he intended to get married in the near future, or perhaps if that intention came to the solicitor's knowledge in a less direct way.

Decision of Ashworth J. reversed.

In 1933 the plaintiff, then Mrs. Sheela Kathleen James, a widow, was the keeper of a boarding-house, and one Robert Constable Hall was a paying guest. Mrs. James also had living in the house her three grown-up sons. Hall had divorced his wife. Until the year 1947 Hall's financial resources had been small and he had not been in regular employment, but in the spring of that year he won £25,000 in the Irish Hospital Sweep, and through the introduction of Mrs. James he consulted the defendant Meyrick, a solicitor, practising under the style of Greene and Underhill, for advice as to the collection of the money. In May, 1947, Hall executed a will prepared for him by the defendant under which he left the whole of his property to the plaintiff. In the following year, or early in 1949, he bought a house in Finchley, and this was conveyed to the plaintiff, who went into occupation of it with her sons and Hall.

In September, 1949, Hall executed a settlement under which securities to the value of £6,000 were placed in the names of trustees upon trust to pay the income to the plaintiff for her life, thereafter to Hall for his life, with remainder to the plaintiff's children. On November 29, 1949, the plaintiff and Hall, accompanied by the plaintiff's son Leonard James, met in the defendant's office and instructions were given to the defendant to draw up wills for both the plaintiff and Hall, under which they each left the whole of their property to the other. At that interview Leonard James was said to have observed in a jocular manner: "Why don't you two get married?" To which the plaintiff replied: "We will some day." The wills were duly drawn up by the defendant and approved and executed by the parties, but neither at the interview nor subsequently did he warn the plaintiff that a subsequent marriage to Hall would render both wills nugatory. In September, 1950, Mrs. James married Hall, and although the defendant was made aware of that event he gave no warning as to its effect on the wills. Hall died intestate in 1952, and the plaintiff brought the present action claiming damages against the defendant for the loss of the benefits which had been conferred on her by her husband's will. By her statement of claim she alleged that she and Hall had "jointly retained and employed the "defendant to advise them in making mutual wills in contempla- "tion of marriage."

H. J. Phillimore Q.C. and *J. W. Borders* for the plaintiff.
F. W. Beney Q.C. and *A. G. Friend* for the defendant.

The following cases were cited in argument in addition to those referred to in the judgment: *Pilkington* v. *Wood*[1]; *André et Cie, S.A.* v. *J. H. Vantol Ltd.*[2]

Cur. adv. vult.

Dec. 21, 1956. Ashworth J. read the following judgment: The plaintiff in this action is Sheela Kathleen Hall, the widow of Robert Constable Hall. She claims damages for the alleged negligence of the defendant who was at all material times practising as a solicitor in Bedford Row, under the style of Greene & Underhill. The plaintiff first came into touch with that firm in the year 1931 when one Underhill was the senior partner, but on his death in that same year the defendant took over the practice, and the plaintiff from time to time consulted him during the next 15 years or thereabouts. Her surname was then James, and she was a widow with four children, James having died in

[1] [1953] Ch. 770; [1953] 2 All E.R. 810.

[2] [1952] 2 Lloyd's Rep. 282.

1931. In her younger days she had been engaged to Hall, but they had parted and they did not meet again until the year 1933. At that time the plaintiff was a widow and Hall had been divorced by his wife. It is only fair to the plaintiff to point out that no suggestion whatever was made against her in the divorce proceedings taken by Hall's wife. In the year 1933 or 1934 Hall began to live as a paying-guest in the house at Highgate occupied by the plaintiff and her four children. I accept without hesitation the plaintiff's evidence that at no time between 1933 and September, 1950, when she eventually married him, was there any immorality between herself and Hall.

Until the year 1947 Hall's financial resources were small and he was not in regular employment, but in the spring of that year he had the good fortune to win no less than £25,000 in the Irish Sweep, and through the introduction of the plaintiff he consulted the defendant for advice as to the collection of this sum. On May 1, 1947, he executed a will prepared for him by the defendant under which he left the whole of his property to the plaintiff. In the following year or early in 1949 Hall bought a house, 60, Lichfield Grove, Finchley, and this was conveyed to the plaintiff, who went into occupation of it with her children and with Hall. Moreover, in September, 1949, Hall executed a settlement under which securities to the value of £6,000 were placed in the name of trustees upon trust to pay the income to the plaintiff for her life, thereafter to Hall for his life, with remainder to the plaintiff's four children.

The events giving rise to this action occurred in and after the autumn of 1949, and they have to be considered in the light of the earlier history which I have summarized. One additional point should, however, be noted: from time to time between 1934 and 1949, the question of marriage between Hall and the plaintiff was mentioned, but no decision was reached; the plaintiff was more concerned to look after her children, one of whom was an invalid, than with the idea of matrimony.

On November 24, 1949, as appears from a letter written on the following day by the defendant to the plaintiff the plaintiff's son, Leonard James, called on the defendant and, on her behalf, gave oral instructions to the defendant in regard to what is described in the letter as a new will. A draft will was at once prepared by the defendant, but the document has disappeared and there was a conflict of evidence as to its contents. The defendant's recollection is that this draft was in virtually the same form as a will actually executed by the plaintiff on

December 2, 1949, but Leonard James, who gave the oral instructions, says that under the draft will all the plaintiff's property was left to her four children. In my view Leonard James's recollection on this point is to be preferred. However that may be, this draft will was not executed by the plaintiff, and she and Hall decided to call personally at the defendant's office. The interview, which is of crucial importance in this case, took place on November 29, 1949. Three of the witnesses who gave evidence in the case claimed to have been present at the interview and to remember in substance what happened. [His Lordship, upon reviewing the evidence, found that the plaintiff, Hall, the defendant, and Leonard James were present. He continued:]

The evidence as to what occurred at this interview was conflicting. There are four questions which call for decision: (a) By whom were instructions given to the defendant? If instructions were given by more than one person, were those instructions given jointly or severally? (b) What were the instructions? (c) Were the instructions carried out? (d) Apart from such instructions as were given to him, was anything said at the interview which might give rise to a duty on the part of the defendant to do more than carry out the instructions?

My answers to these questions are as follows: (a) It is not disputed that as a result of the interview two wills were drafted by the defendant, one for Hall and one for the plaintiff. This result would appear to involve a finding that instructions to draft wills were given by Hall and by the plaintiff, and it was not seriously suggested that only one of them gave instructions. The real problem is whether instructions were given to the defendant jointly or severally. While it is true that Hall and the plaintiff arrived at the defendant's office together, and were both in his room when the instructions were given, I am satisfied that the instructions were given severally. Each of them, Hall and the plaintiff, wished to make a will, and each wished to confer benefits upon the other, but in my view these were separate wishes and involved separate instructions. On this point I accept the defendant's recollection that he was dealing with Hall and the plaintiff separately. Stress was laid on behalf of the plaintiff on the fact that the defendant only rendered one account to cover the preparation of the two wills, but I do not think that this fact outweighs the evidence of what took place at the interview.

(b) and (c) I have no doubt that the instructions given by Hall and the plaintiff respectively were accurately summarized by the defendant in the correspondence which I have seen. Equally, I have no doubt that the wills drafted by the defendant accurately carried out those instructions. In the course of her evidence the plaintiff admitted this, and as the terms of the respective wills were simple and easy to understand, I am convinced that, if there had been any discrepancy between those terms and the parties' intentions, attention would have been called to it before the documents were executed.

(d) Evidence was given both by the plaintiff and by Leonard James that in the course of discussion at the interview he said: "Why don't you two get married?" to which the plaintiff replied, "We will one day. When we move to the country. "We'll have to get married as everyone knows everyone else's "business." I am satisfied that the question of marriage between Hall and the plaintiff was raised at this interview, and was raised in a form which should have indicated to the defendant that marriage was not merely a fanciful possibility but was a contingency with an aspect of reality about it. It is common ground that the defendant for his part did not pursue the question of marriage between the plaintiff and Hall, either by warning the parties that marriage would involve revocation of the wills then under discussion or by mentioning the possibility of drafting the wills in a form which would leave them unaffected by the marriage.

Before I consider the legal effect of my findings in regard to the interview of November 29, 1949, it is convenient to dispose of two distinct issues. On December 2, 1949, Hall and the plaintiff respectively executed their wills and in the following year they began to look in earnest for a house in the country. They found a house at Alton in Hampshire, and the defendant was instructed to attend to the transfer of the property. It is significant that he prepared the engrossment of the conveyance in the plaintiff's former name of James, and it was with some surprise that he learnt from Leonard James in September, 1950, that the plaintiff had just married Hall. This involved an alteration in the engrossment of the conveyance and a mortgage. So far as the present action is concerned, the marriage of Hall and the plaintiff in September, 1950, had, of course, the effect of revoking the two wills executed on December 2, 1949, but the plaintiff contends that this marriage gave rise to a further duty on the part of the defendant. On her behalf it is submitted that on hearing of the marriage the defendant should have recalled the fact that, some 10 months before, he had prepared wills for each of the parties to the marriage and, irrespective of the

1956

HALL
v.
MEYRICK.

Ashworth J.

question whether he had previously given any warning as to the effect of marriage on the wills, should have notified the parties that by the marriage those wills had been revoked.

I am not satisfied that a duty such as is alleged has been established. I am not prepared to hold, as a rule of general application, that, if a solicitor, who has prepared a will for a single client, thereafter learns that the person has married, he is under any duty to communicate with that person and inform him or her that the will has been revoked by marriage. The existence of such a duty would, in my view, impose upon a solicitor an intolerable burden, since the marriage might take place long after the preparation of the will, the person concerned might no longer be a client of the solicitor and the solicitor might reasonably have forgotten that he had prepared a will for that person, especially if the will itself was not in his possession. In coming to this conclusion I am fortified by the evidence of a practising solicitor who, in giving evidence before me, said: "In "the case of a will not made in contemplation of marriage, if I "learnt that the person had married, I might or might not take "action. If it was someone whom I knew well, I might tele-"phone or write. If the person was not well known to me, it "might be presumptuous. To a limited extent I would be under "an obligation." In cross-examination he was more definite: "I should not regard myself as under any obligation to write "and say that the will was revoked, when I heard of the "marriage." Cases may perhaps occur in which a solicitor would be under a duty to communicate with a person whose will he had prepared, when he learnt of his or her marriage, but in my view such cases would only give rise to this duty because of special circumstances. In the present case I cannot find any special circumstances which imposed upon the defendant a duty in September, 1950, to inform the plaintiff that as a result of her marriage to Hall both her will and his will executed in December, 1949, had been revoked.

After their marriage in September, 1950, the plaintiff and Hall lived at Alton, and it appears that by the month of June, 1952, the plaintiff had formed the impression that Hall was being adversely influenced by persons who wished to exploit him financially. She therefore decided to alter her will and once again consulted the defendant. The plaintiff gave evidence that in the course of the interview, which took place in June, 1952, the will which she had executed on December 2, 1949, was produced and that it was formally torn up and placed in the wastepaper-basket, so as to indicate revocation. The defendant, after some hesitation, admitted that the incident may have occurred, and for my part I am satisfied that it did. What is not disputed is the fact that, although the defendant either realized or should have realized that the plaintiff's will of 1949 had been revoked by her marriage, and that the formal tearing-up of that document was an empty ceremony, he did not mention this to the plaintiff. His reason for not pointing out that the 1949 will was already revoked was said by him to be his concern for Hall, namely, his desire to ensure that the plaintiff did not cut him out of her new will completely as, according to the defendant, she was minded to do. He added, "I knew, of course, that the fresh will "would be revoking the previous will in any event." The will prepared by the defendant was executed by the plaintiff on June 18, 1952, and under its terms the only provision in Hall's favour was the expression of a desire (without the creation of any trust) that the plaintiff's son Reginald Lionel James, to whom she devised and bequeathed the house at Alton with all the furniture and contents therein, should look after him.

It was submitted on behalf of the plaintiff that on this occasion also the defendant failed in his duty to her as her solicitor, in that he failed to point out that her will of 1949 had been revoked by her marriage in 1950. It was urged that, whatever may be the position in regard to the defendant's duty in September, 1950, when he learned of the plaintiff's marriage, but was not directly concerned with her will, in 1952 he was undoubtedly reminded of her will of 1949 since it was on the table in front of him. It was further urged that, even if reference to its revocation by her marriage might have prompted the plaintiff to complain that she had not been fully or properly informed before, it was none the less the defendant's duty to advise the plaintiff frankly as to the position.

When considering this issue, it is in my judgment important to keep in mind that in June, 1952, the client with whom the defendant was dealing was the plaintiff and the plaintiff alone. She was consulting him about her own will; she was not consulting him about Hall's will, nor could she properly do so in his absence, and the defendant did not owe any duty to her to advise her as to the effect of marriage on Hall's will. I have come to the conclusion that, so far as the plaintiff is concerned, the defendant was not in June, 1952, under a duty to inform her that the will which she had made in December, 1949, had been revoked by her marriage. The interview in June, 1952, was, so to speak, an opportunity for the defendant to make good the effect of the plaintiff's marriage on the will which he had prepared for her in 1949, and I am not prepared to hold that, when this opportunity presented itself, he was under a duty to give advice about the previous will, which on any view the plaintiff herself intended to revoke.

In September, 1952, Hall died, and the defendant's actions in the following two months undoubtedly expose him to criticism. In a letter dated September 30 he stated: "I hold his will which "he made in 1949, under which he gave you everything and "made you sole executrix." In evidence the defendant said that he signed this letter on information supplied to him by his clerk, and that he had not read Hall's will when the letter was sent. Even if this letter can be thus explained, it is very difficult to understand how the defendant came to prepare the documents needed to obtain probate, request the plaintiff to attend on him in order to complete those documents, escort her to a commissioner for oaths in order to swear the necessary affidavit, and indorse the will as an exhibit to that affidavit, all apparently without realizing that the will had been revoked by Hall's marriage. On this part of the case the defendant's evidence was far from convincing, but whatever comments may be made regarding his handling of the matter in the autumn of 1952, the plaintiff cannot and does not rely upon anything which occurred after the death of Hall as entitling her to claim against the defendant. The plaintiff's claim falls to be considered in the light of the defendant's conduct before, not after, Hall's death, and for my part I doubt whether that claim is advanced to any material extent by reference to what the defendant did in October and November, 1952.

The writ was issued on March 10, 1954, and the statement of claim was delivered on April 9. Paragraph 2, as originally delivered, read as follows: "In or about November, 1949, the "plaintiff (then Sheela Kathleen James) and the deceased "retained and employed the defendant as their solicitor to advise "them in making mutual wills in contemplation of marriage and "to prepare drafts of the said wills in such form as would carry "out their intentions and instructions, to be executed by them." On May 5 a request was made for further and better particulars under this paragraph, and these were delivered on September 1, 1954, in the following form: "Under paragraph 2. (a) The "request was made orally at a prearranged interview at the "defendant's office at 23 Bedford Row in the County of London "on a day in or about November, 1949. The plaintiff, the defendant, the deceased and Leonard Martin James (son of the "plaintiff) were present. The exact terms of the request was "that wills should be prepared for the deceased and the plaintiff "respectively in the terms mutatis mutandis of the will executed "by the deceased on December 2, 1949.

"(b) The intended marriage of the plaintiff to the deceased "had been discussed between the plaintiff and the deceased and "the defendant on several occasions prior to the above-mentioned "interview. As far as the plaintiff can recollect, no *specific* "request for the plaintiff's will to be expressed to be in contemplation of marriage was made by the plaintiff at the said "interview, but the proposed marriage was discussed by the "plaintiff, the deceased, the said Leonard Martin James and the "defendant. In the presence of the defendant the said Leonard "Martin James asked the plaintiff if she and the deceased really "did intend to marry and the plaintiff answered 'Yes,' but did "not state a specific date for the marriage." In parenthesis I would say that it is quite clear from my previous findings that the allegations made in those particulars were not borne out by the evidence.

Those advising the defendant were not satisfied with these particulars and took out a summons to strike out the statement of claim, but at the hearing of the summons on October 4 counsel for the plaintiff stated that the retainer of the defendant on which the plaintiff relied was a joint retainer by herself and Hall. By consent paragraph 2 of the statement of claim was to be treated as if the word "jointly" had been inserted in line 2 before the word "retained." The defence was delivered on October 5, admitting separate retainers by Hall and the plaintiff to draw their respective wills, but denying any joint retainer or any instructions to prepare wills in contemplation of marriage. In paragraph 5 of the defence it was made clear that if any negligence were established in regard to Hall's will, the defendant would contend that this would not confer on the plaintiff any right to damages.

In the course of Mr. Phillimore's final address on behalf of the plaintiff I indicated that on the evidence I should not be prepared to find that there was any joint retainer of the defendant such as was alleged in the statement of claim, or that the defendant was instructed to draw mutual wills or wills in contemplation of marriage. In those circumstances, while not conceding that my view of the evidence was correct, Mr.

Phillimore asked for leave to amend the statement of claim, alleging separate retainers by the plaintiff and Hall respectively. This request was resisted by Mr. Gordon Friend, on behalf of the defendant, but he did not contend that leave should be refused on the ground that the plaintiff was seeking by amendment to put forward a claim which was statute-barred. Had he done so, I should have felt myself compelled to refuse leave to amend, but, as it was, I granted it, reserving all questions of costs and reserving to Mr. Gordon Friend the right to make further submissions when he had seen and considered the amendment. The date when this leave was granted was November 23, 1956, and the trial was not resumed until December 18, when Mr. Beney appeared with Mr. Gordon Friend on behalf of the defendant. Mr. Beney began with a request that I should reconsider my decision regarding the application for leave to amend the statement of claim, so that he might raise the point that the claim put forward by way of amendment was statute-barred. I felt unable to accede to this request, as the point could have been taken when the question of amendment was first raised. Indeed, although no reference had then been made to the point, much less any express statement made by Mr. Gordon Friend that he would not rely on it, my impression at the time was that he preferred to object to the grant of leave to amend on other grounds.

Both in its original form and in its amended form the statement of claim is, in my view, open to criticism, but I think that the pleading does sufficiently allege what I conceive to be the only ground on which the plaintiff's claim can possibly succeed. Before I consider that ground, it is perhaps convenient to mention in summary form the issues on which she has failed: in my judgment the plaintiff has not established any of the following matters: (a) that the defendant was retained by Hall and herself jointly; or (b) that the defendant was instructed by either Hall or herself that their respective wills were to be drafted in the form appropriate to persons contemplating marriage; or (c) that the defendant failed to draw the respective wills in the terms which the parties respectively desired; or (d) that the defendant was negligent in September, 1950 (when he learnt of the plaintiff's marriage to Hall), in failing to inform her that the wills made by Hall and herself in December, 1949, were revoked; or (e) that the defendant was negligent in June, 1952 (when he prepared a new will for the plaintiff), in failing to inform her that in any event her will made in December, 1949, had been revoked.

In my view the only ground on which the plaintiff's claim can succeed is the allegation that in the circumstances known to the defendant before the interview of November 29, 1949, and in the light of what occurred at that interview he was negligent and in breach of a duty owed by him to his client, the plaintiff, in that he failed to advise her that if she married Hall the wills which were then being prepared for him and for her would be revoked. For the defendant it was contended that, when a solicitor is instructed to prepare a will, there is no contractual obligation on him to give advice regarding the will. In other words, the solicitor's task was said to be confined to the translation into testamentary form of the wishes of his client. In support of this argument reliance was placed upon the decision of the Court of Appeal in *Griffiths* v. *Evans*.[1] In that case the majority of the Court of Appeal held that a solicitor who failed to advise a workman as to his common law rights against his employer at a time when the workman was in receipt of workmen's compensation was not guilty of negligence. In my view that decision is not conclusive in the present case in which the facts are not only different from those in *Griffiths* v. *Evans*,[1] but are also in themselves somewhat unusual. In support of the plaintiff's case before me a practising solicitor was called to give evidence. Having regard to that evidence, and taking into consideration all the surrounding circumstances, I have come to the conclusion that a solicitor in the position of the defendant, upon hearing the reference to marriage which was made at the interview on November 29, 1949, ought to have pointed out that, if a marriage were to take place, the wills then in course of preparation would be revoked. Since his instructions were given to him severally by Hall and the plaintiff, he ought in strictness to have pointed out to each of them severally what the effect of marriage on the wills would be. It was suggested on behalf of the plaintiff that, even if there had been no specific reference to marriage in the course of the discussion on November 29, the defendant should have pointed out the consequences of marriage on the wills, or at least inquired as to the possibility of marriage. For my part I do not think that any general rule can be laid down. The circumstances of each case fall to be considered before the scope of a solicitor's duty in regard to that particular case can be defined. Since I have found that there was a specific reference to marriage at the interview I prefer not to express any view as to the defendant's duty in different circumstances.

---

[1] [1953] 1 W.L.R. 1424; [1953] 2 All E.R. 1364.

In my judgment, therefore, the plaintiff has succeeded in establishing negligence on the part of the defendant in November, 1949, and the problem of damages accordingly arises. I confess that I have found it exceedingly difficult. On behalf of the plaintiff it was contended that she had lost the difference between the value of Hall's estate and the value of her interest in that estate upon his intestacy. There was some conflict regarding the figure to be taken as representing the total value of the estate. In my judgment a fair figure is the sum of £3,850. This figure is reached by valuing the preference shares in Securos Ltd. at 10s. each, and the ordinary shares at 15s. each, thus reducing the total of £6,000, mentioned in the statement of claim and the particulars thereunder, to £3,850. As Hall died intestate the plaintiff took from his estate the sum of £1,550, and a life interest in one half of the remainder. I assess the capital value of this life interest at £750. Accordingly, instead of receiving absolutely property to the value of £3,850, the plaintiff has obtained property and interest worth in all £2,300. The most, therefore, which she can recover, is the difference between the last-mentioned figures, namely, £1,550.

It is clear from the decision in *Groom* v. *Crocker*[2] that, although the term negligence is used to describe the nature of the plaintiff's claim, that claim is in effect a claim for damages for breach of contract. It follows, therefore, that what is generally referred to as the rule in *Hadley* v. *Baxendale*[3] is applicable, subject to the effect of later decisions, of which one of the most recent and important is *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*[4] I do not propose to lengthen this judgment with lengthy extracts from the decision of the Court of Appeal in the last-mentioned case, but I have carefully considered all that was said in it.

For the defendant it was contended that the plaintiff was at best only entitled to nominal damages, and that any loss which she might have sustained owing to the fact that Hall's will made in December, 1949, was revoked by his marriage and that he died intestate was too remote. It was said that such loss could not possibly be regarded as damage "arising naturally, "i.e., according to the usual course of things" from the

[2] [1939] 1 K.B. 194; 54 T.L.R. 861; [1938] 2 All E.R. 394.

[3] (1854) 9 Exch. 341.

[4] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.

defendant's breach of his contract with the plaintiff so as to come within the first part of the rule in *Hadley* v. *Baxendale*.[5] Further, it was said that such loss was not such as the defendant as a reasonable man should have contemplated as a likely result so as to bring the case within the second part of the rule. Moreover, it was contended that the alleged loss was one which was dependent upon so many contingencies that damages could not in law be awarded in respect of it, and reference was made to the decision of Jelf J. in *Sapwell* v. *Bass*.[6] That case must, however, be read in the light of the decision of the Court of Appeal in *Chaplin* v. *Hicks*.[7] The headnote to the last-mentioned case contains these words: "The existence of a contingency "which is dependent on the volition of a third person does not "necessarily render the damages for a breach of contract "incapable of assessment." In his judgment Fletcher Moulton L.J. said [8]: "Mr. McCardie does not deny that there is a con-"tract, nor that its terms are as the plaintiff alleges them to be, "nor that it is enforceable, but he contends that the plaintiff "can only recover nominal damages, say one shilling. To start "with, he puts it thus: where the expectation of the plaintiff "depends on a contingency, only nominal damages are recover-"able. Upon examination, this principle is obviously much too "wide; everything that can happen in the future depends on a "contingency, and such a principle would deprive a plaintiff "of anything beyond nominal damages for a breach of contract "where the damages could not be assessed with mathematical "accuracy. The learned counsel admitted that it was very "difficult to formulate his proposition, but he ultimately said "that where the volition of another comes between the com-"petitor and what he hopes to get under the contract, no "damages can, as matter of law, be given. I can find no "authority for that proposition; in fact, the decision in *Richard-"son* v. *Mellish* [9] is obviously in the teeth of it. I do not rely, "however, on that or on any other authority; I would rather "consider what is the right of a plaintiff as regards damages for "breach of a contract, and regarding it as a matter of broad "general principle, I do not think that any such distinction as "that suggested by Mr. McCardie can be drawn. The common "law courts never enforced contracts specifically, as was done

---

[5] 9 Exch. 341.

[6] [1910] 2 K.B. 486; 26 T.L.R. 452.

[7] [1911] 2 K.B. 786; 27 T.L.R. 458.

[8] [1911] 2 K.B. 786, 793.

[9] (1824) 2 Bing. 229.

"in equity; if a contract was broken, the common law held that "an adequate solatium was to be found in a pecuniary sum, "that is, in the damages assessed by a jury. But there is no "other universal principle as to the amount of damages than that "it is the aim of the law to ensure that a person whose contract "has been broken shall be placed as near as possible in the "same position as if it had not."

There is, however, much force in the argument that, to establish her claim in full, the plaintiff must invite the court to assume (a) that she would have remembered a warning, if given, as to the revoking effect of marriage; (b) that Hall would have been willing to make a further will, either after marriage to the plaintiff or expressly in contemplation of such marriage; (c) that such will would have been wholly in her favour; and (d) that Hall would not thereafter have revoked it. All these points may be described as contingencies upon which her receipt of an exclusive interest in Hall's estate depended, and in the face of so many contingencies Mr. Beney submitted that the alleged loss must be regarded as too remote.

On behalf of the plaintiff Mr. Phillimore submitted that the damages claimed were the direct and natural consequence of the defendant's breach of contract and came fairly within the first part of the rule in *Hadley* v. *Baxendale*.[10] As I understood the argument, it came to this: owing to the absence of any warning as to the effect of marriage on the wills, the plaintiff did the very thing which a warning would have prevented, namely, married Hall and thereby so to speak, disinherited herself. This argument seems to me to involve the conclusion that, if the defendant had warned the plaintiff, as was his duty, she would not have married Hall. I am quite unable to draw that conclusion from the evidence In my view the plaintiff would have married Hall in September, 1950, whether the warning had been given or not. In support of his argument on this point Mr. Phillimore relied upon the decision of Upjohn J. in *Otter* v. *Church, Adams, Tatham & Co.*[11] He argued that the present plaintiff's marriage in 1950 was to be equated with the death of Michael, the tenant in tail in *Otter's* case,[11] and that the plaintiff's loss was, as he put it, crystallized on her marriage. In my view that argument fails. In *Otter's* case [11] the death of Michael intestate meant the end of any opportunity for him to make the settled property his own absolutely, whereas the plaintiff's marriage did not mean that she had no further opportunity to obtain an exclusive interest in Hall's estate. The headnote in the report of *Otter's* case [11] makes it clear that Michael's death was the loss of the opportunity to increase his estate, and that the measure of damages was the loss to Michael's estate occasioned by the passing of the settled property to the next tenant in tail, due allowance being made for the possibility that Michael on being properly advised might not have disentailed.

---

[10] 9 Exch. 341.

[11] [1953] Ch. 280; [1953] 1 All E.R. 168.

This was indeed the alternative way in which the plaintiff's claim was put, namely, that, owing to the absence of any warning, the plaintiff failed to take any steps either before or after her marriage to Hall to obtain under a new will by him the same benefits as he was willing to confer on her in December, 1949; in other words, the loss which she has sustained is the loss of the chance or opportunity to secure those benefits. Expressed in this way, the claim seems to me to be one which may be said to fall within both parts of the rule in *Hadley* v. *Baxendale*.[12] The plaintiff's lack of knowledge as to the effect of marriage and the consequential absence of any occasion to persuade Hall to make a new will can, I think, be regarded as the direct and natural result of the defendant's breach of contract. Alternatively, if the defendant can be regarded in imagination as contemplating the effect of this breach, I think that it is not unreasonable to impute to him realization of the fact that he would be depriving the plaintiff of the chance of recovering for herself the benefits which she would, but for the marriage, have gained from the will of 1949. I hold, therefore, that the damage alleged is not too remote.

It does not by any means follow that the plaintiff is on this footing entitled to the full difference between the value of her interest under a will leaving everything to her and the value of her interest on intestacy. It is at this point that the effect of the various contingencies to which Mr. Beney referred must be taken into account. The more the contingencies, the lower the value of the chance or opportunity of which the plaintiff was deprived. On the other hand, the contingencies must be fairly assessed, and if there was a reasonable prospect of their being satisfied in a manner favourable to the plaintiff, the amount by which the full claim falls to be discounted is correspondingly reduced.

---

[11] [1953] Ch. 280.

[12] 9 Exch. 341.

Having seen the plaintiff in the witness-box, I formed the impression that she was a person with a mind and a will of her own and that she was in a position to exercise strong influence over Hall. This is not said in any sense of criticism, but as one reason why I have come to the conclusion that, if she had known the true position, she would probably have made it her business to see that Hall made a new will in her favour after their marriage. I do not think that she would have forgotten the warning, if it had been given, and, while nobody can be certain what Hall's reaction would have been, I think that it is more likely than not that he would have agreed to make a new will in her favour. After all, he had been prepared in December, 1949, to leave everything to her, and there is no reason to suppose that his attitude would have changed when she had agreed to marry him. Even if by the summer of 1952 Hall was showing a tendency to invest his money unwisely, the same is not true of the year 1950 when the plaintiff married him.

Any assessment of damages in a case of this sort is bound to appear somewhat arbitrary, but I have endeavoured to find a figure which fairly represents the plaintiff's loss after giving due allowance for all the uncertainties. The sum for which I give judgment in favour of the plaintiff is £1,250.

Judgment for the plaintiff.

[Reported by D. TRAFFORD OWEN, Esq., Barrister-at-Law.]

The defendant appealed, primarily on the ground that leave to amend provisionally granted should have been revoked by the trial judge, because it would have the effect of taking away from the defendant the benefit of the Statute of Limitations.

F. W. Beney Q.C. and *Gordon Friend* for the defendant. At the hearing of this action, after evidence had been called and counsel had addressed the court, the trial judge intimated that he was unable to accept the plaintiff's case that she and Hall had jointly retained the defendant to draft mutual wills in contemplation of marriage. If matters had rested there, judgment would have been given for the defendant. But an application on behalf of the plaintiff for leave to amend the statement of claim was granted by the judge, and the hearing was adjourned for further evidence, if required. At the adjourned hearing the plaintiff raised, by amendment of the statement of claim, a new cause of action which was statute barred. The question whether an amendment should be made is within the discretion of the judge, but where the amendment involves the prejudicing of a right which is open to the opposite party, the court will not, it is submitted, allow the amendment. The judge, however, came to the conclusion that it was too late to raise the limitation point. In the circumstances he did not consider it right to resile from his previous order. Had he not thought that he was fettered the judge would have withdrawn his leave to amend. Under the general rule of practice a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which, having regard to the date of the writ, are barred by the Statute of Limitations: *Weldon* v. *Neal.*[1]

The defendant, it is submitted, had faithfully carried out the instructions given to him by the parties, and the evidence of what had occurred at the material interview was not sufficient to put the defendant on the alert. The judge, having rightly decided the case in favour of the defendant on the case as first put, came to a wrong decision on the amended case. [*Griffiths* v. *Evans*[2] was also referred to.]

H. J. Phillimore Q.C. and *J. W. Borders* for the plaintiff. The defendant, in evidence, said that if the question of marriage had been raised at the interview it would then have been his duty to give a warning to the parties.

[ORMEROD L.J. The evidence of Leonard James is that he suggested marriage in a jocular way.]

The whole transaction should have put the defendant awake to the possibility of marriage.

[PARKER L.J. It was a family joke and the son was drawing his mother out in a jocular way—everybody laughed.]

There was evidence, and having regard to what was said it was the defendant's duty to warn the parties that the wills would be revoked by marriage. Apart from what was said, the judge was entitled to take into consideration the actual circumstances. A judge is entitled to give a provisional leave to amend. Having done so, he has, in his discretion, a right to change his mind.

[PARKER L.J. Once the point is taken that the amendment is statute barred, the judge, if he has a right to draw back, must do so.]

It is submitted that the judge was wrong in finding that paragraph 6 of the statement of claim could stand by itself as an allegation of negligence. On the balance of probability the judge was entitled to accept the evidence of the plaintiff's son.

---

[1] (1887) 19 Q.B.D. 394.

[2] [1953] 1 W.L.R. 1424.

Beney Q.C. in reply. The judge accepted the evidence of the defendant that his instructions were separate and not joint instructions. Paragraph 6 must refer back to paragraph 2, which alleges a joint retainer. It is really an action for breach of contract although it is brought against a solicitor for negligence. If the statement of claim puts forward claims which are not stated in the writ, it is the statement of claim and not the writ which must be looked to. [*Smith* v. *Fox* [3] and *Marshall* v. *London Transport Executive* [4] were referred to.]

HODSON L.J. This is an appeal from a judgment of Ashworth J. given on December 21, 1956. The action was brought by Mrs. Hall, the widow of a man called Robert Constable Hall, against a solicitor named Meyrick, for damages for loss incurred through the defendant's negligence in his capacity as solicitor. The judge first of all found that the case as advanced by the plaintiff was not established, but, at the conclusion of the addresses of counsel, he stated that the question of amendment might at that late stage be considered. It was considered on November 23, 1956, and he did in general terms give leave to the plaintiff to amend; but, as his judgment shows, he did not exclude the defendant from raising objections to the amendment when it had been formulated. On December 23, 1956, the amendment had been formulated. At that stage leading counsel, Mr. Beney, who has appeared in this court, was instructed for the defendant, and he took a point which had not been taken before, but which was in the judge's mind, as he stated, namely, that if this amendment were allowed it would have the effect of taking away from the defendant the benefit of the Statute of Limitations. The judge felt obliged, as he thought, in fairness to the parties, not to resile from the position he had previously taken up, and, therefore, he did not reverse his original decision that there should be, or could be, an amendment.

The first point taken by the appellant in this court is that the judge was wrong in allowing the amendment; that he was in no sense barred by the fact that, the objection not being taken at the earliest possible moment, he had come provisionally to the view that the amendment could be allowed, and that if the judge has expressed himself by word of mouth, until the order has been perfected he can, if he is so minded, make a different order. This court is asked to deal with this case on the basis that it is unjust to the defendant, in accordance with well-established authority, to deprive him of the benefit of the Statute of Limitations by a circuitous route. Secondly, it is said that the judge, having decided the case correctly in favour of the defendant on the case as put, was wrong on the amended case, because, in the circumstances here, there was no duty upon the defendant of which he was in breach. Finally, it is said that the damages of £1,200 assessed by the judge did not in any event flow from the breach, if any.

---

[3] (1848) 6 Hare 386.

[4] [1936] 3 All E.R. 83.

Having regard to the decision which I have reached, I do not propose to say anything about the difficult question—and, indeed, from the academic point of view, the interesting question—whether it can be said on the facts of this case, there being a breach, that any damages would flow from that breach, or whether the damages assessed by the trial judge were very largely excessive, having regard to the number of contingencies involved in this case before any damage could be suffered by the plaintiff. I propose to rest my decision on the first point in this case, namely, the question whether the amendment ought to be allowed. [His Lordship stated the facts and continued:] One of the questions which is raised on this appeal and is naturally one of great importance and interest to solicitors, is whether the judge was right in holding, as he did, that there was any duty at all, in the circumstances, on a solicitor to draw the attention of the client or clients to the provisions of section 18 of the Wills Act. I have said that I do not propose to give any concluded finding on this point, but I think it is right to say this. I would not for one moment suppose that it was the duty of a solicitor in all cases to draw the attention of persons who come into his office to make wills to the effect of marriage on a will. In such a case I must use the words which are so well known, that "each case depends upon its own "particular facts." This is a very special and unusual case.

As I have already said, the parties came into the solicitor's office, a man and a woman each known to the solicitor to be single, each desiring to benefit the other substantially to the extent of their whole possessions before death by their wills. They were known to have been living together for 15 years as housekeeper and boarder. As the judge accepted the evidence of the plaintiff's son, who was present, and who was the man who helped the plaintiff to do her business, that the solicitor's attention had been drawn to the prospect of marriage, and also accepted the evidence of another solicitor to the effect that as a matter of good practice it would be right, in those circumstances, for a solicitor

C. A.
1957

Hall
v.
Meyrick.

Hodson L.J.

to ask questions and to draw the attention of the client to section 18 of the Wills Act, and the defendant having admitted that if such a state of affairs as I have described existed there would be a duty upon him to draw his client's attention to the possibility of marriage, this case is one in which the judge's decision at any rate is supported by evidence. I leave that matter, having, I hope, made it quite clear that I am not going to impose an extravagant standard of duty on solicitors who are making wills for their clients.

I come back to the point which was put first in this appeal. That depends on how this case was pleaded. The writ as endorsed was for damages for negligence " and failure to use reasonable " skill and diligence as solicitor for the plaintiff "; but, when the statement of claim was delivered, the form of action was made plain, and according to the provisions of Ord. 20, r. 4, in my opinion, from that moment the statement of claim, and the statement of claim only, is the document to be looked at in order to see what it was that the plaintiff was claiming.

In paragraph 2 of the statement of claim the plaintiff claims that in November, 1949, she and Hall " retained and employed " the defendant as their solicitor to advise them in making mutual " wills in contemplation of marriage and to prepare drafts of the " said wills in such form as would carry out their intention and " instructions to be executed by them." Application was made to strike out the statement of claim, and in those proceedings an undertaking was given on October 4, 1954, to save the expense of amendment, to the effect that between the word " deceased " and the word " retained " the word " jointly " should be treated as having been inserted; so that the allegation in paragraph 2 was that the plaintiff and Hall had " jointly retained " as solicitor the defendant " to advise them " in making their wills. So far as the mutual wills were concerned in contemplation of marriage, their case failed; they did not establish that. The judge came to an adverse conclusion, with which I shall have to deal, upon the question whether or not there was a joint retainer.

Before leaving the pleadings, I should refer further to the statement of claim as it originally stood. It went on to recite that drafts were prepared and that the wills were executed on December 2, 1949, by each of the persons concerned. In paragraph 6 of the statement of claim it is alleged: " The defendant " further negligently failed to advise the plaintiff or the deceased, " as it was his duty to do, that both the said wills would be " revoked by their marriage." Paragraph 8 refers to a fact which

C. A.
1957

HALL
v.
MEYRICK.

Hodson L.J.

I should have previously stated, namely, that on September 23, 1950, the plaintiff and Hall were married, and their wills were thereby revoked. Hall died on December 27, 1952, without having made a further will, and it is as a result of that event that the plaintiff claims to have suffered loss.

The amendment which was subsequently made, the judge having rejected the case originally put forward by the plaintiff, was as follows: "In or about November, 1949, the plaintiff and "the deceased jointly or alternatively separately in the presence "of each other retained and employed the defendant as their "solicitor to advise them in making and to draft and prepare for "execution wills whereby each was to confer benefits upon the "other. On or about the 29th day of November, 1949, at an interview between the plaintiff, the deceased, and the defendant, at "which the son of the plaintiff, one Leonard Martin James, was "present, the defendant was informed, as the fact was, that the "plaintiff and the deceased were contemplating marriage as and "when they moved from London to the country, as they were "intending to do." The new paragraph 5 is: "The defendant "negligently failed to express in the draft of the said wills that "each of the same was made in contemplation of the marriage of "the plaintiff and the deceased, and in consequence the said "representations" which he had made "were untrue, as the "defendant well knew, or ought to have known."

The effect of that amendment is to substitute the allegation that there was a separate retainer of the solicitor by the plaintiff as an alternative to the joint retainer which had originally been alleged. The point at once emerges that, if a separate contract is alleged between the plaintiff and the solicitor, that is an entirely new contract, a different contract from that which was originally pleaded, and, having regard to the lapse of time, the defence of the Statute of Limitations is, on the face of it, available to the defendant if he so chooses.

Mr. Phillimore, on behalf of the plaintiff, has sought to avoid that difficulty in two ways: first of all, on the pleadings as they stand, he has submitted that paragraph 6 of the statement of claim can stand by itself as an allegation of negligence. I think that this submission fails, because the only basis of an allegation of negligence between the plaintiff and the defendant, her solicitor, is contract. I think that is clear from the authorities, to one of which, *Groom* v. *Crocker*,[1] the judge referred. When one looks at the statement of claim, which is the right document to look at, one sees that the contract pleaded, and the only contract pleaded, is in paragraph 2, which sets out a contract between the plaintiff and Hall jointly with the defendant. Therefore, I think that submission fails.

---

[1] [1939] 1 K.B. 194; 54 T.L.R. 861; [1939] 2 All E.R. 394.

The second submission is that, on the case as originally pleaded, the plaintiff was entitled to succeed, because the judge was wrong in finding, as he did, that there was an independent retainer on the part of these two people as opposed to a joint retainer. The judge expressed his conclusion in no uncertain terms upon this matter, and I have no doubt that he was right. He said [2]: "It is not disputed that as a result of the interview "two wills were drafted by the defendant, one for Mr. Hall and "one for the plaintiff. This result would appear to involve a "finding that instructions to draft wills were given by Mr. Hall "and by the plaintiff, and it was not seriously suggested that only "one of them gave instructions. The real problem is whether "instructions were given to the defendant jointly or severally. "While it is true that Mr. Hall and the plaintiff arrived at the "defendant's office together, and were both in his room when the "instructions were given, I am satisfied that the instructions "were given severally. Each of them, Hall and the plaintiff, "wished to make a will, and each wished to confer benefits upon "the other, but in my view these were separate wishes and "involved separate instructions. On this point I accept the "defendant's recollection that he was dealing with Mr. Hall and "the plaintiff separately."

The note on p. 3 of the correspondence is one that I have already referred to in passing. It is a document which is of a kind commonly produced by a solicitor when he takes instructions from a client for making a will. It is headed: "Instructions given by "Mr. Hall and Mrs. James on November 29, 1949." It reads: "If Sheela Kathleen James shall not survive me for 14 days then "I appoint HIM as executor"—that is the solicitor—"and give "all to (1) Sheela Jessie Holden"—that is the daughter—"and "(2) Leonard Martin James"—that is the eldest son—"(3) Cyril "Nally James, (4) Reginald Lionel James absolutely." Then Mrs. James's name appears, followed by the words: "To Mr. Hall "house and £2,000, the same executors, and residue to children." Then there is a note which the solicitor added as to the spelling of the name "Sheela"—"? Sheila"—and then a note "By "Friday."

---

[2] Ante 460.

It is to be observed (and Mr. Phillimore relies upon it) that there were features in this matter which point towards the retainer being joint, because these people were acting in concert, each seeking to benefit the other. Moreover, only one account was rendered to cover the preparation of the two wills, the wills themselves were sent under one cover to Mr. Hall, the account was sent to the son Leonard, and the bill was paid by the mother, the plaintiff. Those considerations, to my mind, do not displace the correctness of the judge's conclusion that these were independent instructions given by two independent people. Therefore, the claim as based upon the pleading in the statement of claim must fail.

Then one comes to the question of amendment. The general rule is quite clear, that the plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have been barred by the Statute of Limitations. That principle was declared in no uncertain terms by Lord Esher in *Weldon* v. *Neal.*[3] Lord Esher said[4]: "We "must act on the settled rule of practice, which is that amend"ments are not admissible when they prejudice the rights of the "opposite party as existing at the date of such amendments. If "an amendment were allowed setting up a cause of action, which, "if the writ were issued in respect thereof at the date of the "amendment, would be barred by the Statute of Limitations, it "would be allowing the plaintiff to take advantage of her former "writ to defeat the statute and taking away an existing right from "the defendant, a proceeding which, as a general rule, would be, "in my opinion, improper and unjust." Then he said that[5] "Under very peculiar circumstances the court might perhaps have "power to allow such an amendment, but certainly as a general "rule it will not do so. This case comes within that rule of "practice, and there are no peculiar circumstances of any sort "to constitute it an exception to such rule." Lindley L.J. was of the same opinion. He said[6]: "I do not think it would be just "to the defendant to allow these amendments, the effect of which "would be to deprive him of his defence under the Statute of "Limitations." Lopes L.J.[7] was of the same opinion. He said: "The effect of allowing those amendments would be to take "away from the defendant the defence under that statute and "therefore unjustly to prejudice the defendant."

---

[3] (1887) 19 Q.B.D. 394.

[4] Ibid. 395.

[5] Ibid. 395.

[6] Ibid. 395, 396.

[7] Ibid. 396.

Mr. Phillimore has not been able to indicate to us any peculiar circumstances which would, in the mind of Lord Esher or this court, be likely to influence it in departing from that general rule of practice. For example, it is not suggested in any way that the plaintiff was tricked by the defendant or lulled into a sense of false security that the statute would not be pleaded against her. No question of that kind arises. Therefore, I see no possible ground upon which this court could depart from the ordinary rule.

I think that the judge was wrong in permitting the amendment as he did, when the objection was taken that it would have the effect of depriving the defendant of the benefit of the Statute of Limitations. For that reason, I would allow this appeal.

PARKER L.J. I have come to the same conclusion. I think it is quite clear that, unless amended, the claim as pleaded must fail. The contract alleged was a joint retainer to prepare mutual wills in contemplation of marriage. In so far as the contract alleged was for the making of mutual wills in contemplation of marriage, it clearly was not proved. Indeed, when the particulars under the statement of claim were delivered, it was clear that the plaintiff could not substantiate that claim. Nor do I see any reason to differ from the judge in coming to the conclusion that there was no joint retainer but several retainers by the plaintiff and Hall for the preparation of their wills. Indeed, it seems to me that, once a contract for the preparation of wills in contemplation of marriage is not persisted in, the presumption is that there is no joint retainer. Here the wills were not even mutual wills in the strict sense of the term, and I think it would require very special circumstances from which the court could infer a joint retainer.

Mr. Phillimore stressed, as one of the circumstances to be taken into consideration, the fact that a single bill was rendered. No doubt that is a circumstance to take into consideration, but for my part I cannot treat that as something from which a joint retainer should be inferred. The bill was in fact sent to the plaintiff's son, who had been acting for both parties, and who in fact had sent the solicitor the wills when completed. The matter seems to me to be concluded by the express finding of the judge, who clearly accepted on this point the evidence of the defendant.

Mr. Phillimore also strongly relied on paragraph 6 of the statement of claim, which is in these terms: "The defendant further "negligently failed to advise the plaintiff or the deceased, as it "was his duty to do, that both the said wills would be revoked "by their marriage." He said that the words in that paragraph were sufficient to cover the claim as now presented. I think it is clear from that that it must be read with paragraph 2 of the statement of claim. The basis of the claim is contract, and the only contract pleaded of which paragraph 6 is alleging a breach is the joint retainer in paragraph 2. If that were not clear of itself, it seems to me that the very wording of paragraph 6 makes it clear, because the duty which is said to be broken is a duty to advise the plaintiff herself of the fact that *both wills* would be revoked. That duty could only arise under a joint retainer.

In regard to the amendment, I will only say this. It often happens in the course of a trial that an application is made by a party for leave to amend, and the trial judge may well then and there express the view that he will allow an amendment or will consider an amendment; but, unless and until the amendment has been put into writing and submitted to the other side, and the other side have had an opportunity of making submissions upon it, anything that the trial judge has said must be in the nature of a provisional view, and not a final ruling. Indeed, in this case, as I understand it, that was what Ashworth J. himself intended, because in reciting the events he says this in his judgment[8]: "I granted it,"—that was the leave to amend—"reserving all "questions of costs and reserving to Mr. Gordon Friend"—who appeared for the defendant—"the right to make further submis- "sions when he had seen and considered the amendment." It seems to me that was the proper attitude, the judge treating anything he had previously said as purely provisional. When, therefore, the hearing was resumed on December 18, 1956, and Mr. Beney drew attention to the fact that the proposed amendment was setting up a statute-barred claim, there could be no question of the judge being bound by any previous ruling. His discretion was completely unfettered by what had gone before. That being so, once it appeared that the new claim was statute-barred, and the defendant objected to the amendment on that ground, I think the judge was bound, in the proper exercise of his discretion, to refuse the amendment.

I may add this, that, even if the judge had intended to give a final ruling, it was always open to him, until the order was drawn up, to change his mind. Though, no doubt, a judge would not take that course where the matter had been argued and submissions had been made, yet it seems to me, in a case where there is

---

[8] Ante 466.

C. A.
1957

Hall
v.
Meyrick.

Parker L.J.

an element of surprise and counsel has not had a full opportunity of making his submission, that it would be perfectly proper for the judge to take a different view from that which he had already expressed.

In my judgment, this appeal should be allowed on these grounds, and I find it unnecessary to go into the further question whether the defendant in this case was guilty of any breach of contract or duty, and as to any damages which might result. I would, however, expressly say that I entirely associate myself with the general observations that my Lord has made on the duty of a solicitor.

ORMEROD L.J. I agree that this appeal should be allowed on the ground that the original instructions having been separate and independent, as the judge, in my view, has properly found, the case as originally pleaded could not stand. I agree, for the reasons which have already been given by my brothers, that it was a wrongful exercise of his discretion for the judge to allow the pleadings to be amended in such a way as to cause to be pleaded a cause of action which was, at the time of the amendment, statute-barred.

The only observations I would like to make upon the case would be about the duty of a solicitor in these circumstances. I agree with the remarks which have fallen from Hodson L.J. on this matter. I have no doubt that it would be the clear duty of a solicitor, on being instructed to prepare a will, to advise his client of the effect of subsequent marriage on the will if, in fact, the client told him that he was intending to get married in the near future, or even, perhaps, if the client's intention came to the knowledge of the solicitor in a less direct way; but I certainly do not accept the view that it is the duty of a solicitor so to advise merely because the question of marriage has been casually, and perhaps jocularly, mentioned to the solicitor in an interview, either by a third person, as was the case here, or even by the client himself. Whether the duty would arise on such an occasion would depend, in my judgment, on the actual words used at the time and on the whole of the circumstances in which they were used, including, of course, the previous knowledge of the solicitor of the affairs and intentions of his client.

In view of the evidence in this case given on behalf of the plaintiff, which consists of the evidence of the plaintiff herself and of her son, Leonard James, I am bound to say that I would have felt very reluctant to find here that there was a breach of duty on the part of the solicitor, except, possibly, for the fact that the defendant himself, in re-examination in answer to the judge, did say that if the words were said which in fact the judge found were said, then he would have regarded it as his duty to warn the plaintiff about the effect of subsequent marriage on the wills. However, that is not a matter which now falls to be considered. Certainly it is true in a case of this kind that the judge who has an opportunity of seeing the witnesses and considering their evidence as it was given, is in the best position to form a clear picture as to what happened, and in those circumstances it might well be that this court should be reluctant to interfere with the judge's decision; but, in view of the fact that this appeal is being allowed on the ground that the amendment should not have been granted, it is unnecessary to consider the matter further.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *J. F. Coules & Co.; Linsley-Thomas & Joslin.*

A. W. G.

REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL AND ANOTHER.

Ex parte QUEEN MARY COLLEGE, UNIVERSITY OF LONDON.

1957
June 26, 27.

Lord Goddard C.J.,
Byrne and
Devlin JJ.

Trade Dispute—Industrial Disputes Tribunal—Jurisdiction—Claim by workman for promotion—Resolution passed by union meeting to refer matter to tribunal—"Dispute" arising out of workman's claim referred by union to Minister—Members of union parties to the dispute—Dispute between "workmen" and employers—Dispute connected with the terms of the employment of "any of those workmen"—Industrial Disputes Order, 1951 (*S.I.* 1951, *No.* 1376), *arts.* 10, 12 (1).

Statute—Construction—Plural—Whether including singular—Industrial dispute—Interpretation Act, 1889 (52 & 53 *Vict. c.* 63), *s.* 1.

By article 12 (1) of the Industrial Disputes Order, 1951, "'dispute' . . . means any dispute between an employer and workmen "in the employment of that employer connected with the terms of "the employment or with the conditions of labour of any of those "workmen."

A technician, a laboratory assistant employed by a university college, applied to the college for promotion to the grade of senior technician. The college refused his application and the technician reported the matter to the Association of Scientific Workers, a trade union of which he was a member. The regional organiser of the union, on a request made by the members of the college group of the union, asked the registrar of the college for an opportunity of discussing the grading of some of the members of the group. The college authorities refused that request, being of the opinion that the question whether any individual workman was to be upgraded was a purely domestic matter for them to decide and that, therefore, they were not prepared to consider requests from the union or any other external body regarding the upgrading of individual technicians. Subsequently the college group of the union held a meeting at which they passed a resolution that the matter be referred to the Industrial Disputes Tribunal. By that time the college authorities had considered and granted a number of individual applications for upgrading and at the date of the meeting there were two outstanding cases, one of which was that of the technician in question, and the meeting agreed that his was the case to be reported. Accordingly, the regional organiser reported to the Minister of Labour and National Service "a dispute between this "association and the governing body of" the college arising "from "the grading of [the technician] who we believe should be graded "as a senior technician. . . ." The Minister, on the basis of that report, referred the "dispute" to the Industrial Disputes Tribunal.

On a motion by the college for an order prohibiting the tribunal from proceeding with the reference on the ground that the tribunal had no jurisdiction because, inter alia, it was a dispute to which only one workman was a party and was, therefore, not a dispute within the meaning of article 12 (1) of the Industrial Disputes Order, 1951:—

Held, that the dispute was a "dispute" within the meaning of article 12 (1) of the order; the mere fact that a person was not materially affected by a decision on the subject-matter of the dispute did not automatically prevent him from being a party to it, and if there was a dispute concerning an individual workman and his union chose, as they had done in the present case, to take up the cudgels on his behalf and make it a union matter, it was a dispute to which more than one workman was a party; that although the word "workmen" in the phrase "dispute between an employer and "workmen" in article 12 (1) of the order was to be construed in the plural, a literal interpretation should be given to the phrase "with the terms of the employment or with the conditions of labour "of any of those workmen," so that it meant terms of employment or conditions of labour "of any one of those workmen"; nor was there any reason why persons should not make themselves parties to a dispute even though they were not workers to whose contract of employment any award would apply; accordingly, the tribunal had jurisdiction to entertain the reference.

Rex v. *National Arbitration Tribunal, Ex parte South Shields Corporation* [1952] 1 K.B. 46; [1951] 2 T.L.R. 791; [1951] 2 All E.R. 828 distinguished.

APPLICATION for an order of prohibition.

As from February 1, 1953, the applicants, the Queen Mary College, University of London, in accordance with an agreement made between the Universities' Committee of Vice-Chancellors and Principals, The Association of Scientific Workers (a trade union) and another trade union, had graded their scientific workers as chief technician, senior technician, technician, and junior technician. In September, 1954, a laboratory assistant employed in the Geology Department at the college, a member of the Association of Scientific Workers, who had been graded as a technician, applied through the college registrar for promotion to the grade of senior technician. His application was refused and in December, 1955, he reported the matter to the association. On January 17, 1956, in consequence of a request made by the secretary of the college group of the association on the instance of members of the group, the regional organiser of the association responsible for the affairs of members of the association in the employment of the college wrote to the registrar asking for an opportunity of meeting him to discuss the grading of some of the members employed as workshop technicians. Correspondence ensued and on March 13, 1956, the registrar wrote to the regional organiser saying that he was instructed to inform him that the governing body of the college were of the opinion that the question whether any individual technician was to be upgraded was a purely domestic matter for them to decide after taking due account of recommendations made by the appropriate authorities in the college and of the application (if any) of the individual technician, and that the governing body was therefore not prepared to consider representations from the association or any other external body regarding the upgrading of individual technicians. The regional organiser replied asking that the college should reconsider its attitude regarding discussions with the association, and that should they be unable to do so he would be obliged to call upon the services of the Minister of Labour and National Service. On April 18 he informed the registrar that he would be reporting the matter to the Ministry of Labour. Following correspondence between the Industrial Relations Officer of the Ministry, in the course of which the governors of the college reaffirmed their view, a meeting of the college group of the association was called on September 11, 1956. At that meeting a resolution was passed "that the group approve of the executive committee's recom-"mendation" [that the matter should, subject to the approval of the group, be taken further by the reporting of a dispute to the Ministry of Labour and National Service with the object of securing a reference to the Industrial Disputes Tribunal] "and that the matter be referred to the Industrial Disputes "Tribunal." The governors had in the meantime considered and granted a number of individual applications for upgrading, and at the time of the meeting there were two main cases outstanding, one of which was that of the technician in question, and the meeting agreed that his was the case to be reported. Accordingly, on November 6, 1956, the regional organiser formally reported to the Minister "a dispute between this association and the "governing body of Queen Mary College, University of London," stating "The dispute arises from the grading of the technician "in charge of the Geology Department, . . . who, we believe, "should be graded as senior technician and not as technician. "Our member has himself made approaches to the college for "immediate upgrading to senior technician but, as he met with "no success, referred the matter to us"; and reciting the events summarized above. Meanwhile, on November 7, the technician himself, having had a conversation with an official of the college, wrote to the registrar asking for a statement in writing that he would be appointed curator or librarian in the senior technical grade as from September 1, 1957. On hearing of the technician's application the regional organiser asked the Ministry of Labour and National Service to hold the matter in abeyance, but, the registrar having replied to the technician that he could not finally commit the college in advance of the decision of the college body responsible for such matters, the regional organiser asked the Ministry to proceed. On January 31, 1957, the Minister, in exercise of the power conferred on him by article 8 of the Industrial Disputes Order, 1951, on the basis of the regional organiser's letter of November 6, 1956, referred to the Industrial Disputes Tribunal for settlement a dispute described as one between: "Employers: Queen Mary College, University of "London" and "Workers: Members of the Association of "Scientific Workers in the employment of the said employers," arising "out of a claim made by the said workers that [the] "technician in charge of the Geology Department should be "immediately upgraded to senior technician I."

The college applied for an order of prohibition prohibiting the Industrial Disputes Tribunal and the association from further proceeding in the arbitration or settlement of the dispute concerning the upgrading of the technician under the Minister's reference on the grounds that the tribunal had no jurisdiction in respect of the reference because (1) the dispute referred was not within the definition of dispute contained in article 12 (1) of the Industrial Disputes Order, 1951 [1]; (2) the dispute was not between the college and workmen in their employment, none of their workmen other than the technician being a party to it; (3) the claim that the technician should be immediately upgraded had been made not by workmen in the employment of the college but only by the technician and the association acting exclusively on his behalf; and (4) that the association had not acted and was not acting in the matter of the dispute for or on behalf of other workmen in the employment of the college but only for the technician.

Further facts are stated in the judgment.

John Donaldson for the applicant college. A "dispute" is not a "dispute" within the definition in article 12 (1) of the Industrial Disputes Order, 1951, unless it is a dispute between an employer and two or more workers: *Rex* v. *National Arbitration Tribunal, Ex parte South Shields Corporation.* [2] Here the only dispute is between the applicants and one workman, the technician in question, so that it is not a dispute within the order and the tribunal has no jurisdiction to hear the reference. In *Rex* v. *National Arbitration Tribunal, Ex parte South Shields Corporation* [2] it was held that the Interpretation Act, 1889, did not apply to the word "workmen" in the first part of the definition in article 12 (1), and that that word must be construed in the plural only; it would be ambiguous if the same construction were not given to the same word in the phrase "connected with "the terms of the employment or with the conditions of labour of "any of those workmen" in the second part of the definition.

---

[1] The Industrial Disputes Order, 1951, art. 10: "Where an award on "a dispute or issue has been made by "the Tribunal, then as from the date "of the award or from such other "date . . . as the Tribunal may "direct, it shall be an implied term "of the contract between the "employer and workers to whom "the award applies that the terms "and conditions of employment to be "observed under the contract shall be "in accordance with the award until "varied by agreement between the "parties or by a subsequent award."

Art. 12 (1): "In this Order, "unless the contrary intention "appears . . . 'dispute' does not "include a dispute as to the employ"ment or non-employment of any "person or as to whether any person "should or should not be a member "of any trade union but, save as "aforesaid, means any dispute be"tween an employer and workmen in "the employment of that employer "connected with the terms of the "employment or with the conditions "of labour of any of those work"men; . . ."

[2] [1952] 1 K.B. 46; [1951] 2 T.L.R. 791; [1951] 2 All E.R. 828.

The mere use of the word " any " cannot reduce the meaning of the word " workmen " to " workman." Article 10 provides that where an award has been made it is to become an implied term of the contract of employment between the employers and the " workers to whom the award applies." That clearly shows that the order contemplates that what is to be referred is a dispute between an employer and " workers," not one workman.

Even if the dispute can be said to be one between the college and the members of the college group of the association, it is nevertheless submitted that there is still no " dispute " within the meaning of article 12 (1), because only one worker is concerned—see the expression " workers concerned " in article 10—with the subject-matter of the dispute, and it is only connected with the terms and conditions of employment of one workman. A dispute which refers to one workman may concern others, and had the association claimed that on the true construction of the agreement of February 1, 1953, the post of the technician in question should be that of a senior technician, the position would have been different. But that is not the association's claim, and what has to be looked at is what was in fact referred; that was a claim that the technician should be immediately upgraded. An award by the tribunal upgrading the technician would not concern the other members of the group, nor could the terms and conditions of employment of the other members be in accordance with such an award. It could only affect the contract of employment of the technician himself.

The jurisdiction of the tribunal is a statutory jurisdiction and references must be construed strictly. [Reference was made to *Reg.* v. *Industrial Disputes Tribunal, Ex parte Practical Banking Ltd.*[3]] The reference here was of a claim by the technician for immediate upgrading, but he had asked the applicants that he be upgraded on September 1, 1957, or that he be given a position as curator or librarian. At the relevant date, therefore, the date of the report to the Minister, there was no dispute. No claim for immediate upgrading had been made to the applicants by either the technician or the association, and there had been no specific refusal of that claim by the applicants, so that at the date of the report to the Minister there was no dispute.

Walter Gumbel for the Minister of Labour and National Service. In *Rex* v. *National Arbitration Tribunal, Ex parte South Shields Corporation*[4] all that was actually decided was

---

[3] [1952] 2 Q.B. 662; [1952] 1 T.L.R. 1448; [1952] 1 All E.R. 1370.

[4] [1952] 1 K.B. 46.

1957

REGINA
v.
INDUSTRIAL
DISPUTES
TRIBUNAL.

that on the construction of the Industrial Disputes Order, 1951, it was not competent for the tribunal to hear the reference, because the dispute was a dispute between the employer and one workman only, and no other workman had supported it in any way. In this case the other members of the group of the association became parties to the dispute in support of the technician, and reliance is placed on the observation of Lord Goddard C.J. in *Rex* v. *National Arbitration Tribunal, Ex parte South Shields Corporation* [5] that "It may well be that this definition is contem-"plating all along a class of workmen, and industrial disputes "do arise because a large number or class of workmen support "a particular workman," and [6]: "What we do decide is that "there must be a dispute between an employer and more than "one workman in his employ, though it may be that the dispute "originates with a single workman, and that the others only "become parties to the dispute in support of one member of their "body." The same view was expressed in *Rex* v. *Industrial Disputes Tribunal, Ex parte Banstead Urban District Council.*[7] In *Reg.* v. *Industrial Disputes Tribunal, Ex parte Derbyshire County Council* [8] only one workman was affected, but he was supported by the trade union and it was held that there was a proper reference. It is submitted, therefore, that the expression "any of those workmen" in article 12 (1) should be construed as meaning "any one of those workmen."

The fact that in *Rex* v. *National Arbitration Tribunal, Ex parte South Shields Corporation* [9] the court held that the Interpretation Act, 1889, did not apply to the word "workmen" in the definition of "dispute" in article 12 (1) does not mean that it does not apply to other articles in the regulations, or that the word "workers" in article 10 cannot be construed as including either the singular or the plural. When a dispute arises out of a claim by one workman which is supported by other workmen, then by article 10 an award if made becomes an implied term of the contract of employment of those workmen. There is no reason why the supporters of the claim should be directly concerned.

There is here a dispute which has not only been taken up by a trade union but is also supported by other workmen in the employment of the employers, and it is submitted that it has been properly referred.

---

[5] [1952] 1 K.B. 46, 54.

[6] Ibid. 54.

[7] January 29, 1952 (unreported).

[8] June 11, 1952 (unreported).

[9] [1952] 1 K.B. 46.

1957

Regina v. Industrial Disputes Tribunal.

Peter Pain for the Association of Scientific Workers and the technician concerned. By section 1 of the Interpretation Act, 1889, words in the plural include the singular unless the contrary intention appears; a contrary intention may appear in one paragraph and not in another. The context does not require that the word "workers" in article 10 should not include "worker" in the singular, and that is borne out by the reference in article 12 (1) to "any of those workmen."

This is not a case where the wrong dispute has been referred. The dispute referred was that relating to the claim of the technician to be upgraded; that dispute did in fact receive the support of the other members of the association and it was therefore properly referred to the tribunal.

John Donaldson replied.

Lord Goddard C.J. Devlin J. will deliver the judgment of the court.

Devlin J. In this case Mr. Donaldson moves for a writ of prohibition on behalf of Queen Mary College, University of London, so as to prevent the Industrial Disputes Tribunal and the Association of Scientific Workers from further proceeding in the arbitration or settlement of a dispute concerning the upgrading of one John Norman Carreck which has been referred to the tribunal by the Minister of Labour by a reference in writing dated January 31, 1957. The question to which it gives rise is the meaning of "dispute" under the terms of the Industrial Disputes Order, 1951. Mr. Donaldson submits that the dispute described in the notice of reference is not a dispute within the meaning of that order.

The dispute arises in this way: Carreck, the individual whose claim has given rise to the dispute, is a laboratory assistant in the Department of Geology at Queen Mary College, and has been so employed from July 7, 1947. He and other scientific workers employed at the college are members of the Association of Scientific Workers, which is a trade union. On February 1, 1953, the college agreed to grade its scientific workers in accordance with an agreement made between the Universities' Committee of Vice-Chancellors and Principals and the Scientific Workers Association and another trade union, and they arranged for four grades of chief technician, senior technician, technician and junior technician. Carreck was and is still employed in the grade of technician.

In September, 1954, Carreck applied to the governing body of the college through the registrar for upgrading to the grade of senior technician, and his application was refused. He was apparently sufficiently aggrieved about it to report the matter to his union, which he did in December, 1955. The union has a group within itself, consisting of those scientific workers who are members of the union and who are in the employment of Queen Mary College, for which one Paynter is the responsible regional organiser.

At that time there was a number of other members of the association in the employment of the college who had similar complaints to that of Carreck, and who thought they ought to be upgraded but were not. On January 17, 1956, as a result of a meeting of the group when instructions to that effect were given, the regional organiser wrote to the registrar of the college asking for an opportunity of meeting him so that he could discuss the upgrading of these members. A long correspondence took place. The upshot of it was that at the end the college made its position perfectly clear, which is indeed the position it stands upon today, that it was not prepared to discuss with the union the terms and conditions of employment of individual workers. The college considered, rightly or wrongly, that that was a matter which must be dealt with by the individual member himself direct with the college, and that no external body such as the union ought to be allowed to take part. By March, 1956, the attitude of the governing body had been made quite clear, and the regional organiser was then taking the line that if that was their attitude he would be obliged to call upon the services of the Ministry of Labour to deal with the situation. On April 18 he wrote to the registrar saying that he would be reporting the matter to the Ministry. Some correspondence took place between the Ministry and the college and the college was asked by the Ministry to consider the matter again. The governing body did consider the matter again and reaffirmed the principle which it had previously laid down. As the result, a meeting of the Queen Mary College group of the association was called on September 11, 1956, and the dispute was discussed in detail.

By that time a number of the cases of upgrading that had been in dispute had been considered by the governing body and had been granted and dealt with, so that there was no longer any claim in relation to them. At the date of this meeting there were two cases outstanding, one of which was Carreck's, and a resolution was carried at the meeting that the matter should be referred to the Industrial Disputes Tribunal, and it was agreed, upon the regional organiser's recommendation, that they should select Carreck's case for reporting to the tribunal. Accordingly, on November 6 the regional organiser formally reported the dispute in a letter of that date to the tribunal. He said: "The dispute "arises from the grading of the technician in charge of the "Geology Department, Mr. J. N. Carreck, who, we believe, "should be graded as a senior technician and not as a technician. "Our member has himself made approaches to the college for "immediate upgrading to senior technician but as he met with "no success referred the matter to us." He then recounts at length his efforts to get the college to discuss the matter with him and their refusal to do so, and he ends by saying: "It is, of "course, most unfortunate that the college authorities should "have refused to meet us when we have not experienced this "difficulty with any other college since we have been engaged in "national negotiations with the Committee of Vice-Chancellors "and Principals. Therefore, we have no alternative but to ask "for this individual case of upgrading to be referred to the "Industrial Disputes Tribunal."

Meanwhile, Carreck had apparently decided to make another effort on his own, putting forward his claim individually to the registrar. He had had a conversation with an official of the college at which it appears that they came near to agreement, but that did not content Carreck, and on November 7 he wrote asking for a statement in writing that "Provided that war "has not been declared, I shall be appointed as curator and "librarian in the senior technician grade, as from September 1, "1957." The registrar answered that he could not formally commit himself in such terms and that the matter must be put before the governors. That evidently did not content Carreck because it appears that he reported the matter to the regional organiser and asked him, in effect, to go ahead, saying that what he wanted was an immediate upgrading; he was not prepared to wait till September, 1957. The regional organiser, when he heard of Carreck's individual efforts, had asked that his letter of November 6 to the Ministry of Labour and National Service should be held in abeyance, as it were, but after the registrar's reply to Carreck he asked for it to be treated as having been received on December 5, 1956. Accordingly, the Minister decided on the basis of that letter to refer this dispute to the tribunal.

The main submission that has been made by Mr. Donaldson on behalf of the college is that there is here no dispute within the meaning of article 12 (1) of the order because it is a dispute that concerns only the case of Carreck. *Rex* v. *National Arbitration Tribunal, Ex parte South Shields Corporation,*[1] known as the *Town Clerk's* case, decided that there could not be a dispute within the terms of an order phrased as this one is if it was merely a dispute between a single workman and his employers. That is what Mr. Donaldson submits this dispute is; that it is simply a dispute on the issue whether Carreck should be upgraded or not, and that therefore it is not within the order. There can be no doubt that if that is the right view, and if the only parties to the dispute are the employer on the one hand and Carreck on the other, it comes within the decision in the *Town Clerk's* case.[1] But is that the true position on the facts I have recounted here? The mere fact that a person is not materially affected by a decision on the subject-matter of the dispute does not appear to us automatically to prevent him from being a party to the dispute. There are all sorts of industrial disputes which arise out of a difference between the employer and the employees in a factory in relation to a claim made simply by one man, cases where one man is unfairly victimized in the estimation of his fellow employees, and his fellow employees may make themselves parties to the dispute because they may say: "Unless you "treat this man in the way we think he ought to be treated, there "is going to be trouble," or there may be other reasons which cause men to be interested and to wish to make themselves parties to a dispute which concerns only the claim of one man. Without being materially affected, other people may feel that their prospects of promotion are injured generally. They may be interested in the principle of the thing. They may say: "If "a person of the length of service of Mr. Carreck is not promoted, "what is going to happen to us when we get to that stage?"; or there may be, as in the facts I have recounted, some general principle involved in the dispute on which a particular claim happens to be founded which is selected as a test action, the general principle here being whether it is right or wrong for the college to adopt the attitude that it will not discuss individual claims with the trade union but only with the individuals concerned.

These are plainly the sort of grounds which have caused the trade union in this case to take the matter up, for the regional organiser says at the end of his affidavit: "It is a dispute of

---

[1] [1952] 1 K.B. 46; [1951] 2 T.L.R. 791; [1951] 2 All E.R. 828.

"general interest to such members because the reference derives "from the unwillingness of the applicants to discuss any "individual case of promotion with the association and also "because such members are concerned to secure the upgrading "of a post and to assist a fellow member."

In short, the proposition for which Mr. Gumbel on behalf of the Minister contends really comes down to this: If the union chooses to make the matter a union issue, if it chooses to take up the cudgels on behalf of its member and thereby to become a belligerent in the matter, it is a dispute to which more than one workman is a party. No doubt the union will not do so unless there is a matter of some general principle involved; but if the union chooses to make it a general issue, the matter becomes a dispute to which the whole body or group of workmen are made parties. We think that that is the right view of the matter, and, indeed, we think that it is implicit in the authorities, particularly the *Town Clerk's* case [2] upon which Mr. Donaldson relies for his general proposition. At the end of his judgment in that case Lord Goddard C.J., having said that there was only a single workman involved, said [3]: "It may well be that this definition is "contemplating all along a class of workmen, and industrial "disputes do arise because a large number or class of workmen "support a particular workman who may be dismissed or down-"graded by the employer, or sometimes because some particular "workman is promoted and in the opinion of the body of work-"men someone ought to have been preferred in his place; and it "may be said that it is such matters as that that the order is "contemplating in its definition of dispute. That point we need "not decide. What we do decide is that there must be a dispute "between an employer and more than one workman in his "employ though it may be that the dispute originates with a "single workman, and that the others only become parties to "the dispute in support of one member of their body." That last sentence seems to us exactly to cover the facts of this case.

In *Rex* v. *Industrial Disputes Tribunal, Ex parte Banstead Urban District Council*,[4] a decision of this court, the point is underlined where Lord Goddard C.J. said again: "We pointed "out that the object of the order must be to include the case "where there is a dispute which has been taken up, to use a "convenient expression, by a trade union or trade representatives "of the workmen, and they have made themselves a party to it,

---

[2] [1952] 1 K.B. 46.

[3] Ibid. 54.

[4] January 29, 1952 (unreported).

"although the dispute may only be with regard to one workman, "because of the words 'with the conditions of labour of any "'of those workmen.'" That is how the matter stands on the authorities.

As the matter stands on the construction of the order, Mr. Donaldson has raised a point which has not hitherto been considered, and that is the bearing on this issue of paragraph 10 of the order. Before I deal with that I ought to deal with the definition of "dispute" in article 12 (1), upon which, of course, the matter must ultimately turn. It is as follows: "'Dispute' does not include a dispute as to the employment or "non-employment of any person or as to whether any person "should or should not be a member of any trade union but, save "as aforesaid, means any dispute between an employer and "workmen in the employment of that employer." Pausing there, the *Town Clerk's* case [5] decided that "workmen" is to be construed literally in the plural, and that section 1 of the Interpretation Act, 1899, which provides that normally words in the plural shall include the singular, does not apply to that word, because it is not the intention of the order looked at as a whole that a dispute between a single workman and his employer should be within it. Then the definition goes on: "connected with the "terms of the employment or with the conditions of labour of "any of those workmen." If that is interpreted literally it is enough that it should be the conditions of labour of any one of those workmen. It is quite plain from the passage I have read from the judgment of Lord Goddard C.J. in the *Town Clerk's* case [6] that the decision of the court did not intend to negative a reading of that sort. We see no reason why it should not be given that meaning. If the dispute concerns the conditions of labour of any one of the workmen, provided that others make themselves a party to the dispute, it appears to us to fall within the definition. Mr. Donaldson submits that that cannot be so because of the terms of article 10, which is headed: "Award to be implied term of contract." That article provides that where an award has been made by the tribunal, it should be an implied term of the contract between the employer and workers to whom the award applies that the terms and conditions of employment to be observed under the contract shall be in accordance with the award, and he submits that that means that the workmen who are parties to the dispute must also have, so to speak, a grievance which is to be remedied by the award because the terms of the award are to be read into their contract. He submits that the only award that can be made in this particular case, for example, is that Carreck should be immediately upgraded, and that is not a term which can properly be read into the contract of employment of any other worker. We think that the answer to that lies in this; that it does not follow in a matter of this sort, which is arbitration of a general character and not a strict legal proceeding, that the workers who are parties to the dispute must necessarily be workers to whom the award applies. We think that there is no reason why persons should not make themselves parties to a dispute although they are not workers to whom the award applies. For the reasons we have given, questions of general principle, matters of supporting or assisting a fellow worker, make them parties to the dispute though they are not people to whom the award is going to apply. Mr. Donaldson relies again on the fact that the word "workers" is in the plural, but we see no reason why in relation to this paragraph the Interpretation Act, 1889, should not have its usual effect, and why the word "workers" should not be construed as meaning either the singular or the plural; having regard in particular to the last passage in the judgment of Lord Goddard C.J. in the *Town Clerk's* case [7] there is nothing in the judgment in that case to the contrary. The fact that the Interpretation Act was held not to apply to article 12 (1) does not necessarily mean that it does not apply to other articles in the order and we think that it is plain that the decision in the *Town Clerk's* case [7] was not intended to cover any other article in the order.

---

[5] [1952] 1 K.B. 46.

[6] Ibid. 54.

That concludes the substantial point that has been argued by Mr. Donaldson, but we ought just to say this about a subsidiary point he has argued. He has argued that there is not here any dispute at all, that the matter has not really reached the stage of a dispute between Carreck and the college. It is significant, as is pointed out by Mr. Gumbel, that that is not one of the grounds set forward in the statement. It is significant also that when the notice of reference was sent to the college they did not reply on the basis that there was no dispute, but on the footing that they maintained their attitude that the matter should be dealt with as between the college and the individual worker. We think in this case there is a dispute, though it is of a somewhat narrow character. It concerns simply whether Carreck should be upgraded immediately or whether his claim to be upgraded should, if one may so put it, await favourable consideration on or before September next. No doubt it is a narrow matter to dispute about. It is a matter one can hardly suppose the union would have taken up and referred to the tribunal unless there had been some general principle, as they think, lying behind it, but it is a dispute. He has made a claim to be upgraded immediately; it has not been granted by the college, and the dispute is about that.

---

[7] [1952] 1 K.B. 46, 54.

For these reasons we think that the matter was properly referred to the tribunal, and therefore the order of prohibition must be refused.

Application dismissed.

Solicitors: *Stanley & Co.; Solicitor of Ministry of Labour and National Service; O. H. Parsons.*

J. F. L.

REGINA *v.* JUDGE DUTTON BRIANT. *Ex parte* ABBEY NATIONAL BUILDING SOCIETY.

1957
June 18, 19.

Lord Goddard C.J., Byrne and Devlin JJ.

County Court—Jurisdiction—Action for recovery of land—Mortgagee's claim for possession of mortgaged property—Annual value less than £100*—Amount due and owing in respect of mortgage in excess of* £500*—Whether "action for the recovery of land"—Whether "proceedings . . . for enforcing any charge or lien"—Right of mortgagee to bring action in county court—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *ss.* 48, 52 (1) (*c*) (*as amended*).

Mortgage—Possession, mortgagee's right to—Jurisdiction of county court—Whether action for the recovery of land or proceedings to enforce charge.

Mortgagees brought proceedings in the county court claiming possession of property charged by way of legal mortgage to secure the repayment to them of a sum of money advanced to the mortgagor. They alleged that the mortgagor had defaulted in the payment of instalments due under the mortgage deed. The annual value of the property for rating purposes was less than £100. There was due and owing in respect of the mortgage a sum in excess of £500 and the county court judge declined jurisdiction on the ground that the action was one for the enforcement of a security falling within the provisions of section 52 (1) (*c*) of the County Courts Act, 1934:—

Held, that a claim by a mortgagee for possession of property charged by way of legal mortgage was not "proceedings . . . for

1957

REGINA
v.
JUDGE
DUTTON
BRIANT.

"enforcing any charge or lien" within section 52 (1) (*c*), but a common law "action for the recovery of land" governed by section 48 (1) of the County Courts Act, 1934, and Ord. 24, r. 4 (2), of the County Court Rules, 1936; the mortgagees, therefore, were entitled to bring the action in the county court under section 48 (1) and the county court judge had jurisdiction to determine their claim.

Dictum of Lord Chelmsford L.C. in *Jolly* v. *Arbuthnot* (1859) 4 De G. & J. 224, 235–236 applied.

APPLICATION for an order of mandamus.

On October 24, 1955, the applicants, the Abbey National Building Society, mortgagees of certain premises at Pagham, Sussex, brought proceedings in the Chichester County Court claiming possession only of the mortgaged property. By a legal charge dated September 22, 1955, made between the society and one Brian Leslie Smith, as borrower, the borrower had charged the property in question by way of legal mortgage with the repayment of the sum of £2,040 advanced to him by the society with interest thereon, repayment to be made by monthly instalments of £12 8s. 3d. Clause 7 (1) of the legal charge provided that if default should be made by the borrower for 14 days in payment of any monthly instalment or in the observance or performance of any of the covenants or obligations contained in the charge, the whole of the money payable under the deed should be deemed to be forthwith due and owing and the society might without any previous notice to or concurrence on the part of the borrower (*a*) enter upon the property and execute repairs or other works thereon, (*b*) appoint a receiver and eject from the property the borrower, the tenants and workmen and all other persons then in possession or occupation, and (*c*) in exercise of the statutory power sell all or any part of the property, provided that the society should not exercise any power of sale by reason only of some payment of a monthly instalment or for interest being in arrear until such payment should be three months in arrear. By clause 9 the borrower attorned tenant to the society "Provided that the "society may at any time after one month from the date hereof "without any notice to the borrower determine the tenancy "hereby created and enter upon the property but so that the "said tenancy shall not render the society liable to account to "any person as mortgagee in possession."

The instalments payable under the deed fell into arrear and were more than three months in arrear when the applicants began their proceedings in the county court. At all material times the amount owing and unpaid in respect of the mortgage exceeded the sum of £500 and the net annual value for rating of the property did not exceed the sum of £100.

The borrower filed no defence to the applicants' claim nor did he attend at the county court to contest it, but, at the hearing, before any evidence in support of the claim was called, Judge Dutton Briant asked to be satisfied that he had jurisdiction to hear the case and make the order for possession asked for. After hearing submissions, and after consideration, the judge came to the conclusion that the action constituted a proceeding for the enforcement of a charge within the provisions of section 52 (1) (*c*) of the County Courts Act, 1934,[1] and that, since the amount owing in respect of the mortgage exceeded the sum of £500, he had no jurisdiction to hear the action.

The applicants applied for an order of mandamus directed to the county court judge requiring him to hear and determine their claim against the borrower on the ground that the action was an action for the recovery of land which the judge had jurisdiction to hear by virtue of section 48 (1) of the Act.

W. W. Stabb for the applicant Building Society referred to *Reg.* v. *Judge Willes, Ex parte Abbey National Building Society*,[2] and to County Court Rules, Ord. 24, r. 4 (2), and Form 385. The applicants' action in the county court was an "action for the recovery of land" within section 48 (1) of the County Courts Act, 1934, and does not fall within section 52 (1) (*c*). Such an action by a mortgagee against a mortgagor has always been considered to be an action for the recovery of land: see *Daubuz* v. *Lavington*,[3] where it was held that because there was there a relationship of landlord and tenant created by the mortgage deed the mortgagee might proceed on a specially endorsed writ. Before amendment in 1936, R.S.C., Ord. 55, r. 5A, provided that a legal or equitable mortgagee might obtain by summons relief of the nature of "sale, foreclosure, delivery

---

[1] County Courts Act, 1934, s. 48 (1) (as amended by the County Courts Act, 1955, s. 2 (1) (2), Sch. 1, Part 2, para. 4): "A county court shall have "jurisdiction to hear and determine "any action for the recovery of land "where the net annual value for "rating of the land in question does "not exceed one hundred pounds."

S. 52 (1): "A county court shall "have all the jurisdiction of the High "Court to hear and determine any of "the following proceedings, that is to "say—. . . (*c*) proceedings for fore-"closure or redemption of any mort-"gage or for enforcing any charge or "lien, where the amount owing in "respect of the mortgage, charge or "lien does not exceed the sum of five "hundred pounds."

[2] [1954] 1 W.L.R. 136.

[3] (1884) 13 Q.B.D. 347.

1957

REGINA
v.
JUDGE
DUTTON
BRIANT.

"of possession . . ."; in *Wallis* v. *Griffiths*[4] Eve J. held that the proper procedure for a mortgagee seeking possession only was by an action for the recovery of land. At the time when the County Courts Act, 1934, was passed, therefore, that was the proper way for a mortgagee to proceed in such a case. Under Ord. 55, r. 5A, as amended, any one of seven remedies are available to a mortgagee by summons, but although the Rules of Court have been altered, the nature of the action has not. It is not contended that proceedings for foreclosure and redemption are actions for the recovery of land, but that Ord. 55, r. 5A, as amended, merely extends a special procedure to what was and still is an action for the recovery of land, and that a mortgagee has, apart from the other relief to which he is entitled, a common law right to recover the land: see *Four-Maids Ltd.* v. *Dudley Marshall (Properties) Ltd.*[5] and *Hinckley and Country Building Society* v. *Henny*,[6] where *Jolly* v. *Arbuthnot*[7] was cited.

Once an action falls within section 48 of the County Courts Act, 1934, section 52 (1) (*c*) cannot oust the jurisdiction of the county court: *Godfrey* v. *Lazarus*.[8] Therefore, even if the action has an element of the enforcement of a security, nevertheless it is governed by section 48 (1). Further, as a matter of construction these proceedings do not come within section 52 (1) (*c*); the only reference to "mortgage" in paragraph (*c*) is in relation to proceedings for foreclosure or redemption. The paragraph does not contain the words "or delivery of possession"; contrast the wording of R.S.C., Ord. 55, r. 5A. As to the particulars required by County Court Rules, Ord. 7, r. 7 (2), compare the similar requirements contained in the Practice Directions to R.S.C., Ord. 55, r. 5A.

Rodger Winn for the county court judge. Actions for the recovery of land charged by way of security are a special category to the genus of actions for the recovery of land. Such an action, although an action for the recovery of land, is also an action for enforcing a charge which, by section 52 (1) (*c*) of the County Courts Act, 1934, and the County Court Rules, 1936, is taken out of the genus of actions for the recovery of land and is to be treated differently. In *Reg.* v. *Judge Willes, Ex parte Abbey National*

---

[4] [1921] 2 Ch. 301.

[5] [1957] Ch. 317; [1957] 2 All E.R. 35

[6] [1953] 1 W.L.R. 352; [1953] 1 All E.R. 515.

[7] (1859) 4 De G. & J. 224.

[8] (1887) 4 T.L.R. 101.

Building Society [9] no question as to the rights of mortgagor and mortgagee or of equity arose; that case was concerned only with common law rights and should be distinguished.

In providing for the form of judgment to be drawn up, County Court Rules, Ord. 24, r. 4, distinguishes between "(1) . . . an "action for the recovery of land" and "(2) . . . an action (other "than a foreclosure action) in which there is a claim for posses-"sion of any property forming a security." Where the action falls under (2) the judgment is to include an order as set out in Form 385 or 386. That order preserves the mortgagor's right to redeem; and Forms 385 and 386 are in the fasciculus of forms beginning with Form 381 relating to matters which have the common element of the enforcement of a right controlled by equity and which come within the jurisdiction conferred by section 52 (1). The fact that a claim for foreclosure is expressly excluded from the actions referred to in Ord. 24, r. 4 (2), is a further indication that where the substantial object of the action is to enforce a security, jurisdiction is derived from section 52 (1) and not from section 48.

By section 52 (1) (*c*) of the County Courts Act, 1934, a county court judge, in cases where the amount owing in respect of the security does not exceed £500, has all the jurisdiction of a judge of the High Court. By R.S.C., Ord. 5, r. 5A, all actions, whether commenced by writ or originating summons in which there is a claim for possession of property charged as security for a loan are assigned to the Chancery Division. In *Robertson* v. *Cilia* [10] Upjohn J. treated a claim by a mortgagee for possession as part of the machinery for enforcing the security and held that the court had a discretion to postpone making the order for possession. It is submitted that where the claim is for possession of property charged as security for a loan, a county court judge has the same jurisdiction and discretion as a judge of the Chancery Division of the High Court. In this respect see the particulars required by County Court Rules, Ord. 7, r. 7 (2), to be given by a plaintiff making such a claim. It is significant that the phrase "possession of any property forming a security" used in Ord. 24, r. 4 (2), is also used in Ord. 7, r. 7 (2).

In *Hinckley and Country Building Society* v. *Henny* [11] there was an express provision as to notice determining the tenancy created by the mortgage, and it was held that, as the tenancy had not been determined in accordance with that provision, no right to possession had vested in the mortgagee. In this case there is no question of any relationship of landlord and tenant and the attornment clause is no more than machinery for the enforcement of the charge. The observations of Harman J. in *Four-Maids Ltd.* v. *Dudley Marshall (Properties) Ltd.*[12] were expressly stated to apply only to the "old fashioned" type of mortgage and not to a mortgage such as this where the principal money is paid off by instalments.

---

[9] [1954] 1 W.L.R. 136.

[10] [1956] 1 W.L.R. 1502; [1956] 3 All E.R. 651.

[11] [1953] 1 W.L.R. 352.

The legal right of a mortgagee to recover the property charged is restricted by equity and in the county court a mortgagor receives the protection to which he is entitled to under equitable principles; that protection is ensured by the fact that, when the substance of an action for the recovery of land is the enforcement of a charge, the jurisdiction is derived from section 52 (1) (*c*).

The respondent borrower did not appear and was not represented.

W. W. Stabb in reply. County Court Forms 381 to 383 are referable to orders dealing with accounts in equity. Form 385 is specifically related to Ord. 24, r. 4 (2), and is a judgment in an action for the recovery of land. In *Robertson* v. *Cilia*[13] Upjohn J. said that before 1936 a mortgagee could bring an action for possession in the Queen's Bench Division; despite the subsequent alterations of the rules and the restrictions placed on it, the action remains a common law action for the recovery of land and is governed by section 48 (1) of the County Courts Act, 1934.

LORD GODDARD C.J. In this case Mr. Stabb moves for an order of mandamus directed to Judge Dutton Briant, the judge of the Chichester County Court, directing him to hear and determine an action claiming possession of a house brought by the Abbey National Building Society against one Smith, to whom the society had made an advance secured in the ordinary way by a mortgage. The county court judge, against whom, of course, there is not the smallest reflection, declined jurisdiction on the ground that, since a sum of over £2,000 was outstanding on the mortgage, he was deprived of jurisdiction by section 52 (1) of the County Courts Act, 1934. Section 52 deals with equity proceedings and subsection (1) provides: "(1) A county court shall have all the "jurisdiction of the High Court to hear and determine any of "the following proceedings, that is to say— . . . (*c*) proceedings

---

[12] [1957] Ch. 317.

[13] [1956] 1 W.L.R. 1502, 1506.

"for foreclosure or redemption of any mortgage or for enforcing "any charge or lien, where the amount owing in respect of the "mortgage, charge or lien does not exceed the sum of £500." The judge took the view that the proceedings in this case were proceedings for enforcing a charge or lien and as the amount outstanding was more than £500 he had no jurisdiction.

On the other hand, Mr. Stabb, on behalf of the applicant society, submits that by virtue of section 48 there is jurisdiction because the action is merely one to recover possession of land. Section 48 (1) (as amended by the County Courts Act, 1955) provides: "A county court shall have jurisdiction to hear and "determine any action for the recovery of land where the net "annual value for rating of the land in question does not exceed "the sum of £100." It is agreed in this case that the annual value of the land does not exceed the sum of £100.

The question which has to be determined, therefore, is: has a mortgagee who seeks to recover possession of the mortgaged property a common law right to recover the land or must the action brought to recover the land be regarded as one which, in substance, is an action for the enforcement of a charge?

The first thing to look at is the document which constitutes the mortgage. In the old days, before the Law of Property Act, 1925, and the other legislation dealing with real property in 1925, a legal mortgage was a conveyance to the mortgagee by the mortgagor. The money was advanced and it was provided that it should be repaid in six months' time. Since the Law of Property Act, 1925, mortgages are effected by a deed of legal charge. The legal charge in this case provides for repayment of the moneys advanced by monthly instalments of £12 8s. 3d., and as the amount advanced was £2,040 it will take some years to pay it off.

By clause 7 it is provided: "If default be made by the "borrower for fourteen days in payment of any monthly instal-"ment or other payment hereby covenanted to be made or if "default be made by the borrower in the observance or perform-"ance of any of the covenants or obligations herein expressed or "implied (other than for payment of money) or if any order for "compulsory acquisition of the property or any part thereof shall "be made and confirmed under or by virtue of the Act then and "in any such case the whole of the money payable or to become "payable hereunder shall be deemed to be forthwith due and "owing and the society may without any previous notice to or "concurrence on the part of the borrower:—(*a*) Enter upon the "property and execute or cause to be executed any repairs alterations additions or other works thereto or thereon. (*b*) Appoint "a receiver under the statutory power and eject from the property "the borrower the tenants and workmen and all other persons "then in possession or occupation thereof. (*c*) In exercise of the "statutory power sell all or any part of the property. Provided "always that the society shall not exercise the power of sale "conferred by this deed or by statute by reason only of some "payment of a monthly instalment or for interest being in arrear "until such payment shall be three months in arrear after the "date herein provided for the payment thereof." That puts certain limitations upon the rights of the mortgagees, but it does not deal with the question whether they are entitled to bring an action for the recovery of land.

By clause 9 it is provided: "(1) The borrower hereby attorns "tenant to the society of such parts of the property as now are "or shall at any time during the continuance of this security "(but within 21 years from the date of this mortgage) be in the "occupation of the borrower at the yearly rent of a peppercorn "if demanded. (2) Provided that the society may at any time "after one month from the date hereof without any notice to "the borrower determine the tenancy hereby created and enter "upon the property but so that the said tenancy shall not render "the society liable to account to any person as mortgagee in "possession."

Mr. Rodger Winn, on behalf of the county court judge, points out that clause 9, the attornment clause, puts the mortgagor very much at the mercy of the mortgagees, because it enables them, at the expiration of one month after the money has been advanced, to take proceedings for the ejectment of the mortgagor. It may be that it does, but at the same time, as a matter of business, no one would suppose for one minute that that would be done except in special circumstances, such as the mortgagor going bankrupt within a month. As has been pointed out in other cases, building societies do not want to get possession. What they want is to get punctual payment of their instalments. The last thing that they want to do is to go into possession of the property, and although this attornment clause apparently gives a very wide power which might be harshly used, it is not to be thought that, as a matter of business, it will be so used.

From the earliest times the law has always recognized that a mortgagee has a right to bring an action for the recovery of land and to treat the mortgagor as a trespasser. In *Hinckley* *and Country Building Society* v. *Henny*[1] Upjohn J., considering a matter somewhat akin to that now before this court, quoted[2] this passage from the judgment of Lord Chelmsford L.C. in *Jolly* v. *Arbuthnot*[3]: " 'A mortgagor who remains in possession after " 'the execution of a mortgage, and continues to enjoy the profits " 'of the land, is not considered as a tenant from year to year to " 'the mortgagee, nor even as a tenant at will; he receives the " 'profits for his own use, and not as agent or bailiff of the mort- " 'gagee, and when he has once received them he is absolutely " 'entitled to keep them as his own: *per* Alderson B., *Trent* v. " '*Hunt*.[4] But he may at any time be treated as a trespasser " 'by the mortgagee, who may maintain ejectment against him " 'without any previous notice or demand of possession. Such " 'being the precarious dependence of a mortgagor upon the will " 'of the mortgagee, it is competent to them to enter into an " 'agreement by which the mortgagor's possession may be ren- " 'dered more secure by the creation of a tenancy. This is some- " 'times effected by a stipulation in the mortgage deed itself.' " So it is possible by means of an attornment clause in the mortgage deed and stipulations in that clause to limit the right which a mortgagee would otherwise possess to turn out the mortgagor at any time. The attornment clause in the present case is in the deed of charge, but it certainly does not limit the mortgagee's right, except to the extent of one month, because of the proviso that the society may at any time after one month of the date of the clause, without any notice to the borrower, determine the tenancy. Therefore, the attornment clause in this case does not afford any particular protection to the tenant, and the mortgagor is in the position that after one month he may be turned out at any time at the pleasure of the mortgagee.

Although that right of the mortgagee exists at law and he can treat the mortgagor as a trespasser and bring an action for ejectment, it is to be remembered that from very early days the Court of Equity put this restriction upon the mortgagee's rights: it did not prevent him from bringing the action—and it could not, for that was a common law right—but it regarded the mortgage transaction as a loan on security and, whatever the provisions in the mortgage deed, the mortgagee was always liable to be stopped by equity from enforcing his rights if the mortgagor could redeem the property by payments. A mortgagor, therefore, always has his equity of redemption but, nevertheless, the mortgagee can always maintain an action at law to obtain possession of the land, although, when he does recover it, the right of the mortgagor to redeem still remains and the judgment for possession will always be liable to be controlled by the equitable doctrine that the mortgagor may come forward and pay the money. Of course, the mortgagor has got his rights if he can find some person who, when he cannot pay, is willing to take over the mortgage, and he can require the mortgagee to transfer the mortgage to a person who will pay the mortgagee.

---

[1] [1953] 1 W.L.R. 352; [1953] 1 All E.R. 515.

[2] [1953] 1 W.L.R. 352, 353.

[3] (1859) 4 De G. & J. 224, 235–236.

[4] (1853) 9 Exch. 14, 22.

Section 48 of the County Courts Act, 1934, gives a county court jurisdiction to hear and determine actions for the recovery of land provided that the rateable value is not more than £100, which is the case here, but the county court judge held that what the applicants were really doing was enforcing a charge and, therefore, section 52 applied, and he had to decline jurisdiction because they were, in effect, asking him to enforce a charge to the extent of over £500. I do not think that that is the right view. I think that there is first of all a common law action and that common law action is for the recovery of land. That is the action which was brought in the county court. It is expressly provided by the County Court Rules, Ord. 24, r. 4 (2), and by the form of judgment, Form 385, which is to be drawn up in these cases, that although there will be judgment for possession the judgment must also provide: "And it is ordered that upon "the defendant paying to the plaintiff the monies remaining due "to the plaintiff upon the security of a mortgage [*or* charge] "dated the —— day of ——, 19—, the plaintiff (subject and "without prejudice to the due exercise of any power of sale for "the time being vested in him) do re-deliver to the defendant "possession of the property subject to the said mortgage [*or* "charge] and release to the defendant the security constituted "by the said mortgage [*or* charge]." So if a judgment has been obtained, then, prior to sale by the mortgagees, the mortgagor can come forward and redeem his property by payment.

It may be said: "If this is so, what is the position with "regard to section 52?," because these are proceedings, it is said, for the enforcement of a charge or lien and in effect, of course, the action is to enforce a charge. That may be conceded to the extent that it is a remedy which the mortgagee is taking because he has not been paid and he wants to be paid; in the case of an equitable mortgage, that is to say, a mortgage constituted merely by the deposit of deeds as security, a mortgagee who wanted to enforce his rights would have to take proceedings for the enforcement of a charge, and then the proceedings would be governed by section 52, so that if the amount of the charge was over £500 the county court would have no jurisdiction. It may be also that a mortgagee wants to take other proceedings for the protection or enforcement of his security; he might want a receiver to be appointed, or to exercise a power of sale, or he might seek one of the other equitable remedies which the Courts of Equity have for many years given to mortgagees, and if he wants to exercise any of those remedies, then he must proceed under section 52.

It seems to me that the authorities, in particular the judgment of Lord Chelmsford L.C. in *Jolly* v. *Arbuthnot*,[5] the judgment of Upjohn J. in *Hinckley and Country Building Society* v. *Henny*,[6] and the recent judgment of Harman J. in *Four-Maids Ltd.* v. *Dudley Marshall (Properties) Ltd.*,[7] show that there always was and still is a right in the mortgagee to take proceedings for the recovery of land. Once he gets judgment it may be, and it is no doubt the fact, that equity will give the mortgagor certain rights for his relief if he chooses to use them, but it seems to me that this is a common law action which the common law has always given to a mortgagee and he is entitled to bring it for the recovery of the land which is the subject of the mortgage, subject to this, that a mortgagee must bring his action in a particular form by giving certain particulars which are required by the County Court Rules, as indeed they are required by the High Court Rules, and that the judgment will be in a particular form.

For these reasons I have come to the conclusion that section 48 (1) is the governing section in this case and that a building society or other mortgagee can bring an action in the county court under that section to recover land where he has got a right so to do by reason of the default of the mortgagor to pay the principal or interest.

I am glad to be able to come to this conclusion because it would, I think, be a most unfortunate state of affairs if we had to hold that all these actions must be brought in the High Court. Persons who take mortgages from building societies are generally people who are at any rate not within what are nowadays called the higher income brackets, and it would be very unfortunate if, in addition to what they may be liable for under the covenants, they were to be made liable for costs in the High Court. The

[5] 4 De G. & J. 224, 235–236.

[6] [1953] 1 W.L.R. 352, 353.

[7] [1957] Ch. 317, 320; [1957] 2 All E.R. 35.

Abbey National Building Society in this case did perfectly right in taking proceedings in the county court rather than in the High Court. I am glad to think that the court has come to the conclusion that the county courts have jurisdiction to entertain these actions. For these reasons the order of mandamus must go.

BYRNE J. I entirely agree and there is nothing that I wish to add.

DEVLIN J. I also agree.

Order of mandamus.

Solicitors: *Butt & Bowyer for Wannop & Falconer, Bognor Regis; The Treasury Solicitor.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1957
July 2, 3, 10.

Lord Goddard C.J., Byrne and Devlin JJ.

REGINA v. MARLOW (BUCKS) JUSTICES.
Ex parte SCHILLER.

National Insurance—Contribution—Failure to pay—Conviction for failing to pay one contribution—Order for payment of arrears—Committal for failure to comply with order—Whether "enforceable as a civil debt"—Whether "recoverable as a penalty"—National Insurance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *ss.* 8 (1) (*e*), 54 (1)—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 64, *Sch. III, paras.* 1, 4—*National Insurance (Contributions) Regulations,* 1948 (*S.I. No.* 1417 *of* 1948), *reg.* 19 (5).

Section 8 (1) of the National Insurance Act, 1946, provides: "Regulations may provide . . . (*e*) (without prejudice to any other "remedy) for the recovery, on prosecutions brought under or by "virtue of this Act, of contributions under this Act . . ." By section 54 (1) contributions "shall be recoverable as debts due to "the Crown, and without prejudice to any other remedy may be "recovered by the Minister summarily as a civil debt." Regulation 19 of the National Insurance (Contributions) Regulations, 1948, provides that on conviction of failing to pay a contribution the offender shall be liable to pay, in addition to the sum for which he was convicted, a sum equal to any other contributions which he has failed to pay, and that "(5) Any sum ordered to be paid . . . "under this regulation shall be recoverable as a penalty."

By the Magistrates' Courts Act, 1952, s. 64, where default is made in paying a sum adjudged to be paid by a conviction or order of a magistrates' court, the maximum period for which a person may be committed to prison shall not exceed, by paragraph 1 of the Third Schedule, for "an amount exceeding £20—three "months," and, by paragraph 4: "The maximum period applic-"able to a sum of any amount enforceable as a civil debt shall be "six weeks."

The applicant pleaded guilty to an information laid against him under the National Insurance Act, 1946, alleging that he had failed to pay an insurance contribution due from him. He was fined £4 and ordered to pay costs, and further ordered under regulation 19 of the National Insurance (Contributions) Regulations, 1948, to pay £38 arrears of national insurance contributions due from him. The applicant failed to comply with the order and, on his being brought before them by way of summons, the justices committed him to prison for three months for non-payment of the fines and the arrears of contributions.

On an application for an order of certiorari to quash the committal order on the ground that, inasmuch as the £38 arrears of national insurance contributions was enforceable only as a civil debt, the order was bad in law:—

Held, (1) that the provision in section 8 (1) (*e*) of the Act of 1946, that regulations might provide for the recovery, on prosecution brought under the Act, of contributions, was wide enough to authorize the provision in regulation 19 (5) of the Regulations of 1948 for their recovery as a penalty.

(2) That the combined effect of section 54 (1) of the Act of 1946, and of regulation 19 (5), was that the contributions could be recovered either as a civil debt or as a penalty, but that once their recovery as a penalty had been ordered, they could no longer be described as "enforceable as a civil debt" within the meaning of paragraph 4 of the Third Schedule to the Magistrates' Courts Act, 1952. The committal order, accordingly, was good in law.

APPLICATION for an order of certiorari.

On August 30, 1956, the applicant, Paul William Charles de Zille Schiller, pleaded guilty to an information laid against him under the National Insurance Act, 1946,[1] alleging that he had

---

[1] National Insurance Act, 1946, s. 2: "(6) If any . . . insured person "fails to pay any contribution which "he is liable under this Act to pay, "he shall be liable on summary con-"viction to a fine not exceeding ten "pounds."

S. 54: "(1) All sums due to the "National Insurance Fund shall be "recoverable as debts due to the "Crown, and without prejudice to "any other remedy may be recovered "by the Minister summarily as a "civil debt."

S. 8: "(1) Regulations may pro-"vide . . . (*e*) (without prejudice to "any other remedy) for the recovery, "on prosecutions brought under or "by virtue of this Act, of contribu-"tions under this Act or under the "Industrial Injuries Act."

National Insurance (Contributions) Regulations, 1948, reg. 19: "(1) In any case where . . . an "insured person has been convicted "of the offence under subsection (6) "of section 2 of the Act of failing "to pay a contribution, he shall be failed to pay an insurance contribution due from him under the Act as a self-employed person. The justices fined the applicant £4 and ordered him to pay the costs; they further ordered, under regulation 19 of the National Insurance (Contributions) Regulations, 1948, that he should pay the sum of £38 8s. 3d., arrears of national insurance contributions due from him as a self-employed person to the National Insurance Fund. The applicant failed to comply with the order and on March 28, 1957, was brought before the justices by way of summons in respect of the non-payment, and the justices, having inquired into the means of the applicant, ordered that he be committed to prison for three months for non-payment of the fine and national insurance contributions arrears.

The applicant sought an order of certiorari to bring up and quash the committal order on the grounds that it was wrong in law and contrary to the provisions of the Magistrates' Courts Act, 1952,[2] in that payment of the £38 8s. 3d. arrears of national insurance contributions was enforceable only as a civil debt, and the procedure adopted by the justices on making the order was that prescribed for enforcing the payment of sums adjudged to be paid by a summary conviction, that the three months' imprisonment imposed by the order was in excess of the maximum period of imprisonment which might be imposed in default of payment of a civil debt, and that, therefore, the order was made without jurisdiction and was null and void.

David Kemp for the applicant. Arrears of contributions are enforceable as a civil debt. Section 64 (1) of the Magistrates' Courts Act, 1952, taken in conjunction with the definition of

"liable to pay to the National "Insurance Fund a sum equal to the "amount which he failed to pay. "(3) On any such conviction . . . "evidence may be given . . . (*a*) (i) ". . . of the failure . . . to pay . . . "other contributions . . . during the "two years preceding the date of the "offence. (5) Any sum ordered "to be paid to the National Insurance Fund or the Industrial "Injuries Fund under this regulation "shall be recoverable as a penalty."

[2] Magistrates' Courts Act, 1952, s. 64: "(1) Subject to the following "provisions of this Part of this Act, ". . . where default is made in paying a sum adjudged to be paid by a "conviction or order of a magistrates' "court, the court may issue a warrant . . . committing the defaulter "to prison. (3) The period for which "a person may be committed to "prison under such a warrant . . . "shall not . . . exceed the period "applicable to the case under the "Third Schedule to this Act."

Sch. III: "Maximum periods of "imprisonment in default of payment. "1. Subject to the following provisions of this Schedule, the periods "set out in the . . . following table "shall be the maximum periods "applicable respectively to the "amounts set out opposite thereto. ". . . An amount exceeding twenty "pounds . . . three months. 4. The "maximum period applicable to a "sum of any amount enforceable as "a civil debt shall be six weeks."

"sum enforceable as a civil debt" in section 126 (1), clearly shows that. The justices were wrong in following the procedure provided for enforcing the payment of sums adjudged to be paid by a summary conviction. The maximum sentence was, in any event, six weeks' imprisonment. Although regulation 19 (5) of the National Insurance (Contributions) Regulations makes arrears recoverable as a penalty, if a debt is a civil debt the mere fact that a statute makes such a provision does not alter its character as a civil debt: see *Reg.* v. *Master* [3]; *Reg.* v. *Kerswill* [4]; *Fishwick* v. *Gyani* [5] (*per* Lord Hewart C.J.[6]). On the true construction of regulation 19 (5) the debt remains a civil debt; if the effect is to alter its character the regulation is ultra vires. [Reference was also made to *Shilvock* v. *Booth*.[7]]

Rodger Winn for the Minister of Pensions and National Insurance. Paragraph 1 of the Third Schedule to the Magistrates' Courts Act, 1952, applies. There is a distinction between making criminal procedure available for the recovery of a civil debt and making available the power of the court to order the payment of a sum of money as a sanction; in the latter case the money is payable as part of criminal proceedings based on criminal conduct. Contributions may only be ordered to be paid under regulation 19 where there has been an offence under the Act, and when an order is made under the regulation for their payment the contributions do not cease to be a civil debt, but a fresh liability arises to pay "a sum adjudged to be paid by a conviction" which is enforceable as a criminal debt. In *Shilvock* v. *Booth* [8] Lord Goddard C.J. said [9] "the amount shall be recovered in the same "way as the fine is recovered," and [10] that "liable to pay" meant "he can be told he must pay." See, in this respect, the definition of a "fine" in section 126 (1) of the Magistrates' Courts Act, 1952; a fine is equally recoverable as a civil debt: *H.M. Treasury* v. *Harris*.[11] See also the wide words of the definition of "a sum adjudged to be paid by a conviction or order "of a justices' court" in section 126 (3).

It is accepted that the phrase "recoverable as a penalty" in regulation 19 (5) of the National Insurance (Contributions) Regulations, 1948, has no precise connotation, but the fact that a penalty may also be recoverable in civil proceedings does not make it a civil debt; what has to be looked to is the intention of Parliament as revealed by the context in which the phrase is used. Had there been any indication in the National Insurance Act, 1913, and the Unemployment Insurance Act, 1920, upon which the decision in *Fishwick* v. *Gyani* [12] turned, that the order for the payment of the arrears was intended as a sanction, the court might have taken a different view: see the observations of Lord Hewart C J.[13] That case, therefore, should be distinguished. [Reference was also made to *Reg.* v. *Kerswill.*[14]] Recovery of arrears of contributions as a penalty is not a new method of recovery. The history of the legislation on this matter since the decision in *Fishwick* v. *Gyani* [15] shows that it was the intention of Parliament to adopt language making it clear that the order for payment of contributions was to be regarded as a sanction. Under the Acts in force before 1925 such payments were merely civil debts, but the words "recoverable as a penalty" appear in section 38 (6) of the Widows', Orphans' and Old Age Contributory Pensions Act, 1925, and the phrase was introduced into section 22 of the Unemployment Insurance Act, 1920, by Schedule IV of the amending Unemployment Insurance Act, 1927. Section 22 (3) of the Act of 1920 after such amendment contained a reference to a sum of money "recoverable as a "penalty," and also a reference to recovery of the sum "summarily as a civil debt"; the inference is that the former is intended to be recovered as a criminal debt. See also the amending provisions of section 18 (2) of the National Health Insurance Act, 1928, and section 23 (3) of the Unemployment Insurance Act, 1934. The same differentiation is to be found in the legislation in question in this case. Section 54 of the National Insurance Act, 1948, provides for summary recovery of arrears of contributions as a civil debt, while under section 8 (1) (*e*), without prejudice to any other remedy, there is power to make regulations for their recovery on "prosecutions brought." That contemplates a means of recovery additional to that provided by section 54. Section 69 of the National Insurance (Industrial Injuries) Act, 1946, is in the same terms as regulation 19, and section 8 (1) (*a*) of the National Insurance Act, 1946, shows that the collection of contributions under both those Acts is to be co-ordinated. It is submitted, therefore, that regulation 19 (5) is intra vires the clear power contained in section 8 (1) (*e*) of the

---

[3] (1869) L.R. 4 Q.B. 285, 289.

[4] [1895] 1 Q.B. 1; 11 T.L.R. 8.

[5] [1925] 1 K.B. 617; 41 T.L.R. 253.

[6] [1925] 1 K.B. 617, 620.

[7] [1956] 1 W.L.R. 135; [1956] 1 All E.R. 382.

[8] [1956] 1 W.L.R. 135.

[9] Ibid. 137.

[10] Ibid. 137, 138.

[11] Post 516; [1957] 2 All E.R. 455.

[12] [1925] 1 Q.B. 617.

[13] Ibid. 624, 625.

[14] [1895] 1 Q.B. 1; 11 T.L.R. 8.

[15] [1925] 1 Q.B. 617.

National Insurance Act, 1946, and that the justices were entitled under section 64 and paragraph 1 of the Third Schedule of the Magistrates' Courts Act, 1952, to make the committal order.

Malcolm Milne for the justices. The argument on behalf of the Minister is adopted. *Reg.* v. *Master*[16] and *Reg.* v. *Kerswill*[17] should be distinguished; in neither case was there an offence committed or charged and those cases were concerned not with a sum of money recoverable as a penalty but with the means of recovery of a civil debt. If the argument for the applicant is right and the arrears of contributions are not recoverable as a penalty but are a civil debt within paragraph 4 of the Third Schedule to the Magistrates' Courts Act, 1952, the applicant might well be liable to be committed under paragraph 1 for non-payment of the fine and costs, and also under paragraph 4 to an additional six weeks' imprisonment in respect of his failure to pay the arrears of contributions. The definition of a "sum "adjudged to be paid by a conviction or order of a justices' "court" in section 126 (3) of the Act of 1952 is in much wider terms than that in section 49, the corresponding section, in the Summary Jurisdiction Act, 1879. It is submitted that the definition was widened in order to avoid such duplicity of proceedings and the necessity for two committal orders.

Kemp in reply. *Fishwick* v. *Gyani*[18] cannot be distinguished. The statutory provisions applicable to that case are the same as those which apply today, apart from the regulations. There is nothing in the National Insurance Act, 1946, enabling contributions to be recovered in any way other than provided for by the Act. The fact that a provision similar to that in regulation 19 is to be found in another Act is irrelevant.

Cur. adv. vult.

July 10. LORD GODDARD C.J. Devlin J. will deliver the judgment of the court.

DEVLIN J. On July 27, 1956, an information was laid against the applicant under the National Insurance Act, 1946, alleging that in January, 1956, he failed to pay a contribution due from him under the Act as a self-employed person. The penalty for that offence is prescribed by section 2 (6) of the Act as a fine not exceeding £10.

---

[16] L.R. 4 Q.B. 285.

[17] [1895] 1 Q.B. 1.

[18] [1925] 1 Q.B. 617.

The imposition of a fine does not, of course, relieve the offender of his obligation to pay the contribution, and section 54 (1) of the Act provides that it "shall be recoverable as debts due to the "Crown, and without prejudice to any other remedy may be "recovered by the Minister summarily as a civil debt." Furthermore, regulation 19 of the National Insurance (Contributions) Regulations, 1948, provides that on conviction the offender shall be liable to pay, not only the sum covered by the conviction, but also (subject to certain conditions) a sum equal to the total or other similar contributions which he has failed to pay; and further provides that any sum ordered to be paid under the regulation "shall be recoverable as a penalty."

On August 30, 1956, the applicant appeared before the Marlow justices and was convicted, fined £4 and costs and further ordered under regulation 19 to pay a total of £38 8s. 3d. He has not complied with any part of this order.

By the Magistrates' Courts Act, 1952, s. 64, where default is made in paying a sum adjudged to be paid by a conviction or order the court may issue a warrant of commitment to prison for a period not exceeding that which is made applicable by the Third Schedule. Paragraph 1 of the Schedule sets out a table which shows that "subject to the following provisions of this Schedule" the appropriate period for a sum exceeding £20 is three months. One of the following provisions is paragraph 4, which provides: "The maximum period applicable to a sum of any amount "enforceable as a civil debt shall be six weeks."

On March 28, 1957, the justices made a committal order for three months. Mr. Kemp, for the applicant, moves for certiorari to quash this order. The point is whether the £38 8s. 3d. payable under regulation 19 is a sum "enforceable as a civil debt" within the meaning of paragraph 4 of the Third Schedule. If it is, it is conceded that the committal order is bad. The Minister relies on regulation 19 (5) which, as I have said, provides that the sum is to be "recoverable as a penalty." Mr. Kemp submits that this provision is ineffective to alter the true character of the £38 8s. 3d., which is that of a civil debt; and further, that the provision is ultra vires section 8 of the Act under which it purports to be made.

We have been referred to several decisions on other Acts, but, in my opinion, the question turns entirely on the true construction of paragraph 4. We are not here concerned with the essential character of the sum, but with the mode of its enforcement or recovery. The combined effect of section 54 (1) and regulation 19

(5) is that the sum can now be recovered either as a civil debt or as a penalty. But once its recovery as a penalty has been ordered, I do not think that the sum can any longer be described as "enforceable as a civil debt" within the meaning of paragraph 4.

It is understandable that Mr. Kemp should take the further point of ultra vires. It is at first sight surprising that the Minister should be given an option to turn what is essentially a civil obligation into a criminal debt, which means, among other things, that the defaulter will be deprived of the treatment in prison appropriate to a civil debtor. Mr. Winn points out that recovery as a penalty can be ordered only in relation to an offence for which the defaulter has been or could be prosecuted; and that under the Magistrates' Courts Act, 1952, section 126 (1), "fine" includes pecuniary compensation payable under a conviction. But these are general considerations. The validity of the regulation must be decided by reference to section 8 of the Act which confers the power to make it, and which says in subsection (1) (*e*) that regulations may provide for the recovery, on prosecutions brought under the Act, of contributions. Is this wide enough to authorize recovery as a penalty? This form of recovery of contributions is not new. The substance of regulation 19 has been enacted in all insurance Acts since 1925. Since the Act itself provides in section 54 (1) for its recovery as a civil debt, it is difficult to see what can be meant by its recovery on prosecution except as a penalty, and difficult to suppose that it was intended to abandon this well-established remedy. Furthermore, section 8 (1) (*a*) shows that the collection of national insurance contributions is intended to be co-ordinated with the collection of contributions under the National Insurance (Industrial Injuries) Act, 1946; and section 69 of the latter Act (on which, of course, no point on vires can be taken) is in the same terms as regulation 19.

On these grounds I think that the motion fails.

Application dismissed.
Applicant to pay one set of costs only.

Solicitors: *Giffen, Couch & Gilmore; Solicitor, Ministry of Pensions and National Insurance; Preston, Lane-Claypon & O'Kelly for Reynolds, Parry-Jones & Crawford, High Wycombe.*

J. F. L.

1957
May 20.

Lord Goddard C.J.

TREASURY *v.* HARRIS AND ANOTHER.

[1956 T. No. 828.]

Criminal Law—Sentence—Fine—Death of accused—Imprisonment and fine—Imprisonment and fine imposed by quarter sessions for felony —"Additional imprisonment" in default—Death of felon while serving sentence — Right of Crown to recover fine from personal representatives—Levy of Fines Act, 1822 (3 *Geo.* 4, *c.* 46), *s.* 2— *Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 13, 14, 15.
Crown Proceedings—Fine—Recovery—Death of debtor.

On May 17, 1952, H., on being convicted of felony, was sentenced by quarter sessions to a term of two years' imprisonment and a fine, and, pursuant to section 14 (1) (*c*) and (3) of the Criminal Justice Act, 1948, in default of payment of the fine four months' "additional imprisonment" was imposed. On January 7, 1953, whilst serving the term of two years' imprisonment and before any part of the fine had been paid H. died. The Crown sued his personal representatives for the amount of the fine, and the personal representatives, relying on section 15 (3) of the Act, contended that by reason of H.'s death the date for payment of the fine had not arrived and, therefore, there was no default; alternatively, that the right of the Crown to recover the fine had lapsed upon the death:—

Held, that the Crown was entitled to recover the amount of the fine. A fine was a monetary penalty due to the Crown and as soon as a sentence of a fine was pronounced there at once arose a debt of record due to the Crown; the time for payment of such debt might be postponed under section 14 (1) (*a*) of the Criminal Justice Act, 1948, or, if imprisonment in default of payment was imposed under section 14 (1) (*c*) and the convicted person went to prison, the imprisonment would wipe out the fine, but there was nothing in either section 14 or in section 15 (which was a procedural section) which prevented the fine from remaining a debt of record due to the Crown until it was paid. In the case of a person sentenced to pay a fine being alive, execution could issue against his assets, and in the case of the death of such a person there was no reason why the Crown should not sue his personal representatives for the amount of the fine.

Rex v. *Woolf* (1819) 2 B. & Ald. 609 applied.

Per Lord Goddard C.J. Where the court intends that a term of imprisonment for non-payment of a fine should not begin to run until after the end of another term of imprisonment it is desirable that, in imposing the sentence, the words of section 14 (3) of the Criminal Justice Act, 1948, should be used.

ACTION.

On May 17, 1952, at Southampton Quarter Sessions, Arthur Frank Harris was convicted upon indictment on four counts of having received stolen property knowing the same to have been stolen. The recorder ordered that he be imprisoned for two years concurrently on each of the four counts and also, as he was empowered to do by section 13 of the Criminal Justice Act, 1948,[1] ordered him to pay a fine of £250 on each count (£1,000 in all). In passing sentence the recorder said: "That "will be concurrent, of course, as regards the sentence, and the "fines will be cumulative; that is two years and £1,000 fine. . . . "In default of the payment of any of the fines there will be a "further sentence of four months' imprisonment consecutive in "respect of each fine." The sentence was endorsed on the indictment as "Two years' imprisonment concurrently and fine "of £250 on each of the first, second, third and fourth counts "and to pay £250 towards costs and four months' additional "imprisonment in respect of each fine in default of payment." The certificate of conviction drawn up by the clerk of the peace stated the sentence in similar terms. The clerk of the peace, pursuant to section 2 of the Levy of Fines Act, 1822,[2] entered the fines on the sheriff's estreat roll, the entry on the roll concluding with the words "to be paid on or before expiration of term of "imprisonment to which sentenced at the same sessions."

---

[1] Criminal Justice Act, 1948, s. 13: "Any court before which an offender "is convicted on indictment of felony ". . . shall have power to fine the "offender in lieu of or in addition to "dealing with him in any other "manner in which the court has "power to deal with him."

S. 14: "(1) Subject to the provi"sions of this section, where a fine "is imposed by . . . a court of assize "or quarter sessions, an order may "be made—(a) allowing time for the "payment of the amount of the fine ". . . (c) fixing a term of imprison"ment which the person liable to "make the payment is to undergo if "any sum which he is liable to pay "is not duly paid or recovered . . . "Provided that any term of imprison"ment fixed under this subsection in "default of payment of a fine shall not "exceed twelve months. . . . (3) Where "any person liable for the payment "of a fine . . . to which this section "applies is sentenced by the court to, ". . . a term of imprisonment, the "court may order that any term of "imprisonment fixed under paragraph "(c) of subsection (1) of this section "shall not begin to run until after "the end of the first-mentioned term "of imprisonment."

S. 15: "(1) Any order made under "the last foregoing section before the "enrolment of the fine or recognizance "under section 32 of the Queen's Re"membrancer Act, 1859, or section 2 "of the Levy of Fines Act, 1822, shall "be enrolled under the said section 32 "or the said section 2, as the case may "be: . . . (3) Where an order under "the last foregoing section allowing "time for the payment of the amount "of the fine . . . is enrolled under "subsection (1) of this section, . . . "the officer responsible for the recovery "of the fine . . . shall not exercise "his powers until there is a default "in complying with the order. . . . "(5) Where any such order as afore"said is made fixing a term of im"prisonment in default of payment of "a fine . . . then—(a) on payment of "the fine . . . to the officer responsible "for the recovery thereof, or (if the "person in respect of whom the order "is made is in prison) to the governor "of the prison, the order shall cease "to have effect; . . . (b) on payment "to the said officer or to the governor "of the prison of a part of a fine . . . "the total number of days in the term "of imprisonment shall be reduced "proportionately. . . . (6) Any sums "received by the governor of a prison "under the last foregoing subsection "shall be paid by him to the officer "responsible for the recovery of sums "due in respect of the fine. . . ."

On January 7, 1953, whilst serving the sentence of two years' imprisonment, Harris died. Her Majesty's Treasury, suing on behalf of the Crown pursuant to section 17 (2) of the Crown Proceedings Act, 1947, brought an action against the defendants Elizabeth Harris and Frank Harris, the administrators of the estate of Harris, suing them as personal representatives, and claiming £1,000, the amount of the fines. By the statement of claim it was pleaded that, on being copied by the clerk of the peace onto the sheriff's estreat roll, the fines became, or alternatively, so soon as they were imposed, were, debts of record owed by Arthur Frank Harris to the Crown; that on January 7, 1953, alternatively on May 17, 1954, the term of imprisonment imposed on Arthur Frank Harris expired and upon one or other of those dates the fines and debts became due and payable to the Crown by him or by his estate, but that no part thereof had been paid and that therefore the defendants, as administrators of the estate, were indebted to and bound to pay to the Crown the sum of £1,000.

The defendants denied liability. They alleged that if the order made in respect of terms of imprisonment in default of payment of fines provided that Arthur Frank Harris should have time to pay the fines until the date of expiration of his term of imprisonment, then, by reason of his earlier death, that date had never arrived and the powers of recovery of the fines were in abeyance pursuant to section 15 (3) of the Criminal Justice Act, 1948; alternatively, that if Arthur Frank Harris was ordered to undergo a further four months' imprisonment in respect of each of the fines not paid, to be served consecutively, those further terms of imprisonment began on May 17, 1952, and he had at the date of his death served a proportion of the further terms whereby the fines had been proportionately abated pursuant to section 15 (5) of the Criminal Justice Act, 1948. They also contended that the right to recover the fines lapsed on the death of Harris.

---

[2] Levy of Fines Act, 1822, s. 2 (as amended): ". . . All fines . . . which "shall be set, imposed, lost, or forfeited by or before any justice or "justices of the peace . . . shall be "and are hereby required to be certified by the justice or justices . . . "to the clerk of the peace . . . and "such clerk of the peace . . . shall "copy on a roll such fines . . . and "shall, within . . . twenty-one days ". . . send a copy of such roll, with a "writ of distringas and capias, or fieri "facias and capias . . . to the sheriff ". . . which shall be the authority to "such sheriff . . . for proceeding to the "immediate levying and recovering "of such fines . . . on the goods and "chattels of such several persons, or "for taking into custody the bodies "of such persons, in case sufficient "goods and chattels shall not be found "whereon distress can be made for "recovery thereof; and every person "so taken shall be lodged in the com"mon gaol . . . there to abide the "judgment of the . . . court."

Rodger Winn for the Treasury. On being entered on the indictment, or on being copied onto the sheriff's estreat roll, the amount of the fines became a debt of record owed to the Crown which was then due and recoverable: see *Rex* v. *Woolf*,[3] where it was held that on judgment of a fine being pronounced in respect of a misdemeanor, execution might issue forthwith. Under section 14 of the Criminal Justice Act, 1948, payment of a fine may be postponed or imprisonment be imposed in default of payment: where payment is postponed, the debt becomes due and payable once the period of postponement has passed, but the debt arises at once and it is only the obligation to pay which is postponed. Where imprisonment in default of payment is imposed, the fine is the sentence and the imprisonment is the sanction; there is therefore still a debt which remains until it has been paid or the sentence served. If the sentenced man is alive, it is conceded that he has an option to serve the sentence instead of paying the fine, and that, if he does serve the whole sentence, the fine cannot thereafter be extracted; but if he dies before either paying the fine or serving the sentence, the fine is recoverable against his estate: the position is the same as it is where a civil debt falls to be paid at some future date and the debtor dies before the date of payment, when the debt is recoverable against the estate of the debtor. Reliance is placed on the observations of Lord Goddard C.J. in *Reg.* v. *Rowe*.[4] [Reference was also made to *Hodgson* v. *Lakeman*.[5]]

The obligation of personal representatives to satisfy the debts of the deceased is unqualified. [Reference was made to Williams on Executors and Administrators, 13th ed. (1953), vol. 2, p. 1004.] Further, fines provide a means of recovering ill-gotten gains; in the case of income tax offences there are special provisions for recovery by the Crown of fines; and see the Crown Proceedings Act, 1947, s. 26 (2), applying sections 4 and 5 of the Debtors Act, 1869.

---

[3] (1819) 2 B. & Ald. 609.

[4] [1955] 1 Q.B. 573, 575; [1955] 2 All E.R. 234.

[5] [1943] K.B. 15.

Before 1947 the Crown might recover a debt of record during the lifetime of a debtor by writ of extent, or after his death by diem clausit extremum, but those writs were abolished by section 13 of the Crown Proceedings Act, 1947, which expressly provided that thereafter the Crown might proceed by action. The Levy of Fines Act, 1822, is referred to in section 15 of the Criminal Justice Act, 1948, but in view of the observations of the court in *Rex* v. *Brook* [6] it is uncertain whether it is now practicable to invoke the provisions of that Act. But if the procedure under the Levy of Fines Act, 1822, is still open to the Crown, that does not mean that this action will not lie.

Even if the fines in this case were not recoverable until after the first term of imprisonment had been served, as soon as that term had expired, or on the death of Harris, they became a debt immediately due and payable. That day has long passed and the fines are therefore enforceable and recoverable by action under the provisions of section 13 of the Crown Proceedings Act, 1947.

E. S. Fay Q.C. and *T. R. Crawford* for the defendants. Whatever was the law before the coming into force of the Criminal Justice Act, 1948—and it may be that a fine imposed by a superior court was then a debt owed to the Crown recoverable by civil action (although there is no reported case to that effect)—that Act altered the law and instituted an entirely new procedure with regard to fines imposed after trial on indictment: see the observations of the court in *Rex* v. *Brook.*[7] By the Criminal Justice Act, 1948, Parliament adopted for superior courts the code which had grown up in regard to fines in courts of summary jurisdiction, and the position in regard to fines imposed under the Act is the same as it is in regard to fines imposed by courts of summary jurisdiction, which are not courts of record. A fine is a personal punishment; its efficacy does not lie in its being a debt but in the threat of its being levied. Where imprisonment in default of payment is ordered, the imprisonment is the sanction, but if served it wipes out the fine, so that the fine itself cannot be a true debt in any sense of the word. A fine, therefore, is not now a debt or a debt of record, but a punishment.

[LORD GODDARD C.J. But a friend may pay a fine on behalf of the convicted man.]

---

[6] [1949] 2 K.B. 138; 65 T.L.R. 273; [1949] 1 All E.R. 787.

[7] [1949] 2 K.B. 138.

The status of a volunteer is obscure, but if a fine is paid by another person, that can only be done as by an agent, and the convicted person could if he wished disclaim the agency.

Section 15 of the Criminal Justice Act, 1948, shows the way in which fines are to be recovered, and the operation of the section is limited to fines imposed under section 14 and to such of the powers of the sheriff under the Levy of Fines Act, 1822, as remain. That Act is made use of by section 15 (1) of the Act of 1948, so that any order made under section 14 must be enrolled and sent to the sheriff. The provision in section 15 (2) that notice of the fine must be given to "the officer responsible for "the recovery of the fine" refers back to section 14 (2) and is preliminary to the provision in section 15 (3) that, where time to pay is given, the officer must not exercise his powers until there has been default in complying with the order. The Act of 1948, therefore, clearly contemplates an officer responsible for the recovery of the fine, and on the construction of section 15 that officer can only be the sheriff. If the argument for the Treasury is right, there would be not one officer but two—the sheriff and some person in the Treasury with authority to decide whether to issue a writ in this court. There is, however, no provision for notifying the Treasury such as that to be found in section 15 (3) with regard to the sheriff, so that it must have been intended that the only method of enforcing the fine was to set in motion the procedure under section 15. If it is right that, when time for payment is given, there is at once a debt, but that it is not immediately payable, there would be no necessity for the provision in section 15 (3) directing the sheriff to stay his hand, because if a debt is not due the sheriff has no powers to exercise.

Section 2 of the Levy of Fines Act, 1822, indicates that the estreat roll is the sheriff's only authority for the exercise of his powers; it follows, therefore, that the only powers contemplated by the Criminal Justice Act, 1948, are contained in that section. On the death of a debtor or of the person fined, the powers of the sheriff are at an end; the form of writ sent with the estreat roll did not extend to the goods of such a person which have passed into the hands of others. It is difficult, particularly in view of the observations of the court in *Rex* v. *Brook*,[7] to reconcile the provisions of the Levy of Fines Act, 1822, with those of the Criminal Justice Act, 1948, but although the provisions in the Levy of Fines Act, 1822, as to imprisonment can no longer apply, it is submitted that section 2 must still apply as machinery whereby the sheriff derives his power to recover a fine, otherwise no meaning can be given to "recovered" and "recovery" in sections 14 and 15 of the Act of 1948. A fine, therefore, may be enforced only by the sheriff, and not by action.

---

[7] [1949] 2 K.B. 138.

If the fines in the present case were a debt which did not become due and payable until the end of the first term of imprisonment, the suspension of the power to levy under section 15 (3) is still effective, because, since the convicted man was disabled by death from complying with the order of the court, there has been no default.

Further, if it is right that the time to serve the imprisonment in default of payment of the fine had not come, neither had the time come for the exercise of the option to serve the imprisonment instead of paying the fine. Although section 14 (1) (*c*) provides for imprisonment if the fine is not "paid or recovered," section 15 (5) refers to an order for imprisonment, not on failure to "recover" the fine but on "default of payment." Harris might have chosen to serve the sentence, but he was deprived by death of the chance to exercise the option and, in the circumstances, the Crown cannot recover.

On the order as made, the imprisonment in default of payment of the fine was to be served concurrently with the first sentence: it was not expressed to be consecutive, and the word "additional" does not necessarily mean "consecutive": see section 12 of the Stipendiary Magistrates Act, 1858.

Rodger Winn, in reply, referred to *Rex* v. *Woolf*[8] and *Rex* v. *Shackell*.[9] As to the position when a debt is partly paid by a third person, see *Hirachand Punamchand* v. *Temple*.[10] Where imprisonment in default of payment of a fine is ordered, there may be an option to serve the imprisonment, but the fine is only wiped out if the option is exercised and the sentence served in full. The mere beginning to serve the sentence does not pay the fine. Section 15 (5) provides for the proportional reduction of the imprisonment, but it does not follow that service of part of the sentence satisfies part of the fine. The provisions of section 15 of the Criminal Justice Act, 1948, are merely machinery; there is no implication in the Act that thereafter the law was wholly altered and that the ordinary procedure for the enforcement of fines should not operate. If a fine imposed by a superior court was a debt of record before the passing of the Act, it is still such a debt.

---

[8] 2 B. & Ald. 609.

[9] (1825) M'Cl. & Y. 514.

[10] [1911] 2 K.B. 330; 27 T.L.R. 430.

1957

TREASURY
v.
HARRIS.

LORD GODDARD C.J. This is an action brought by the Treasury pursuant to the Crown Proceedings Act, 1947, to recover against the administrators of Arthur Frank Harris the sum of £1,000, being the amount of four fines of £250 each imposed upon him for certain offences of which he was convicted before the Recorder of Southampton on May 17, 1952. The convictions were convictions for felony, and the recorder passed a sentence of two years' imprisonment and ordered that he should pay a fine of £250 on each of the four counts and costs and should undergo four months' additional imprisonment in respect of each fine in default of payment.

I say at once that, in my opinion, the words "additional "imprisonment" mean imprisonment to follow on the imprisonment which had been awarded in the first part of the sentence. That is to say, the sentence was two years on each of the four counts in the indictment, to run concurrently, and a fine of £250 and the additional, that is to say, consecutive, sentence if he did not pay. Had he not died it would have been contended that he owed the amount of the fines when he went into prison, but the additional sentence could not take effect until he had failed to pay the money and had served the substantive sentence, because otherwise it would not be "additional" to the substantive sentence of two years' imprisonment which had been passed.

The question which arises is whether or not the personal representatives of a dead man, on whom a sentence involving the payment of a fine has been imposed, can be sued by the Crown for the fine. Apparently there is no authority on the point that the industry of counsel can find, but I also have to consider the provisions of the Criminal Justice Act, 1948.

It is important to remember that the conviction here was for a felony, and that, but for the Criminal Justice Act, 1948, a fine could not have been imposed at all, because at common law it is extremely doubtful whether a fine ever could be imposed for a felony. In fact, it was not until the middle of Queen Victoria's reign that provision was made by statute for the penalty of a fine to be imposed in certain cases of felony, but only in those cases which could be dealt with summarily. So it can be stated quite definitely that a court of indictment had no power until the Criminal Justice Act, 1948, came into operation to impose a sentence other than imprisonment for a felony.

[His Lordship read sections 13 and 14 (1) and (3) of the Criminal Justice Act, 1948, and continued:] Although it might be as well if, where the court intends a sentence of imprisonment for non-payment of a fine to follow on a term of imprisonment, the words used in section 14 (3) were followed, I am satisfied that that was the intention of the recorder when he ordered "additional" imprisonment.

Mr. Fay, in the course of a careful argument, submitted that under the provisions of sections 14 and 15 this action cannot lie because, amongst other things, the sheriff is the only person who can recover this debt, and there has been no default.

The first thing that has to be considered is: what is the nature of a fine? The nature of a fine, of course, is a monetary penalty, but it is a monetary penalty which is due to the Crown, and, in my opinion, when a man is sentenced to pay a fine there at once arises a debt of record to the Crown. A civil debt can be a debt of record; a judgment debt, of course, is a debt of record, and I think that a fine is a debt of record and the person entitled to the fine is the Crown (except in the very few exceptional cases where corporations, by charter, have been given the right to receive certain fines). Generally speaking, apart from immaterial exceptions, the fine goes to the Exchequer and I think that it is a debt due to the Crown.

In *Rex* v. *Woolf* [1] it was held: "Where a defendant, in an "indictment for a misdemeanor, has received judgment of fine "and imprisonment"—as was the case here—"a levari facias "may issue immediately to take his goods in execution for the "fine." For some reason which, I dare say, is founded on history, if a debt had to be levied by the sheriff at the suit of the Crown, the writ was called a levari facias; I do not think that that writ really differs in any material respect from a fieri facias, but it is not necessary to go into that.

In 1819, therefore, there was a decision that as soon as the judgment of fine was pronounced the sheriff could levy. It is true that in 1822 the Levy of Fines Act was passed, in order, as the preamble shows, to provide for "the more speedy return and "levying of fines, penalties, and forfeitures, and recognizances "estreated." I suppose that it may have been passed partly because of the decision in *Rex* v. *Woolf*,[1] because it was thought that a more expeditious method of levying fines would be thereby provided. That Act is referred to in the Criminal Justice Act, 1948, as though it were an effective and live Act, but it appears from the judgment in *Rex* v. *Brook* [2] that, by reason of some of the provisions in the Act of 1948, very considerable amendments have been made to the law contained in it. But, after all, I am only concerned with the provisions of sections 14 and 15 of the Criminal Justice Act, 1948, and it does not seem to me that there is anything in either of those sections which in any way alters the law that a fine is a debt due to the Crown. Section 14 (1) (*c*) provides that the court may fix " a term of imprisonment which " the person liable to make the payment is to undergo if any sum " which he is liable to pay is not duly paid or recovered," and I think that the use of the word " recovered " shows that the Crown may take steps to recover the money. The ordinary steps which the Crown would take would be to recover the money by means of a writ, whether it be of levari facias or fieri facias matters not; but it would be difficult for them to take proceedings under the Levy of Fines Act, 1822.

---

[1] (1819) 2 B. & Ald. 609.

[2] [1949] 2 K.B. 138; 65 T.L.R. 273.

The difficulty in this case has arisen because Harris died while serving the substantive sentence of imprisonment passed on him, and the fines had never been levied, since it was thought that he would have until he had finished that sentence to pay them. I need not decide now whether, under an order drawn up as the order in this case was drawn up, it is to be presumed that the recorder gave him time to pay the fine until he came out of prison. I think that he probably did not. It seems to me, from the conviction as it was drawn up, that the fines were immediately payable, and if one was not paid by whoever had the management of his affairs while he was in prison—as, of course, a receiver could be appointed if necessary—he would have had to undergo, instead of two years, a sentence of two years and four months, but he could always avoid the additional four months by paying. If it is necessary for me to decide it, under the form of order and conviction drawn up here, it does not seem to me that the payment of the fines was postponed until he came out of prison.

But whether it was or was not postponed, the time has long gone by when those fines should have been paid, and the question is whether the fact of his death, so that he could no longer be imprisoned, has done away with the fines. In my opinion, it has not. I think that the fine is a debt due to the Crown and remains a debt due to the Crown. Although there may be various consequences which can be imposed by the court if a man does not pay, I do not think that there is anything in either section 14 or section 15 of the Criminal Justice Act, 1948, which says that a man can prevent the Crown from recovering the amount of a fine by electing to go to prison, although if he does go to prison I have no doubt that the imprisonment wipes out the fine. Where a fine has been imposed by the court it is not uncommon for some sympathizer or person interested in the particular matter in respect of which the defendant has gone to prison to pay the fine for the defendant. If the Crown gets the money the Crown cannot keep the man in prison, and I doubt very much whether, once the money has been paid, the defendant can say: "I am not coming out of prison; I am going to stay in prison." This court has had to deal with curious cases in which persons imprisoned for contempt, for not executing deeds and documents, and so forth, have refused to apply to be released, even though they have only got to sign the documents, and the court has begged and implored them so to do. In one or two cases we have had persons who have said they were more comfortable in prison than they were out, and that they preferred to stay where they were. That is in civil process, but in criminal process I do not think that would apply. If a sympathizer comes forward and pays the fine, he has discharged the Crown's debt: the Crown has received the money, and I do not think that the person fined can say that he objects to it and will remain in prison.

Mr. Fay called attention to the provisions of section 15 of the Criminal Justice Act, 1948, and pointed out the difficulty of reconciling those provisions with the Levy of Fines Act, 1822. Should this case go to the Court of Appeal it will be open to that court to consider the judgment of the Court of Criminal Appeal in *Rex* v. *Brook*[2]; in their judgment in that case the Court of Criminal Appeal considered that, once the Criminal Justice Act, 1948, was passed, there was very little left of the Levy of Fines Act, 1822, and the Court of Appeal will no doubt be free to say whether they agree with it. But I cannot find anything in section 15—which I hold to be procedural—to say that if a defendant has assets, there is anything to prevent the sheriff levying. If no levy can take place, it is difficult to understand what meaning can be given to the words "or recovered" in section 14 (1) (*c*). I do not think that those words can be confined to the case where the Crown is recovering the fine by being paid by a friend or relative of the person convicted. I think it must mean "paid or recovered" by process of law.

Section 15 was necessary because of the fact that section 14 contemplates that time may be given to pay: once time is given, the convicted person may make applications for further time; and there is also a provision for payment by instalments and the convicted person can ask the court to vary the instalments; then there are the provisions that if a man is sentenced to pay a fine and does not pay it, and is taken to prison, he can buy his release by paying the money, and if he pays a part of the fine, then, by section 15 (5) (*b*): "the total number of days in the term of "imprisonment shall be reduced proportionately, that is to say, "by such number of days as bears to the said total number of "days less one day the proportion most nearly approximating to, "without exceeding, the proportion which the part paid bears "to the amount of the fine." In other words, if a man was sentenced to a month's imprisonment and after a week's imprisonment pays three-quarters of the fine, or substantially three-quarters of the fine, he can be discharged. It seems to me, although the matter is not altogether clear, that regarding the provisions of section 15 as procedural—indeed, the marginal note is "Incidental provisions as to fines and forfeited recognizances"—the debt remains until it is paid.

---

[2] [1949] 2 K.B. 138.

Turning to the authority of the sheriff to levy, his only authority is to levy on the goods of the person himself, and if that person has died a difficulty arises. In a civil suit provision is made, by the Rules of Court, for an application to be made to the court for leave to issue execution against the dead man's assets, which would be in the hands of his executors or administrators. If it is a matter of a fine, section 15 seems to make no provision for the eventuality of the death of a man who has been sentenced to a fine or imprisonment in default. There is a difficulty, I think, in ordering the sheriff to seize, but I think that, in the case of a convicted person sentenced to pay a fine who is alive, execution can issue against his assets, although if he does not pay he may also be liable to be imprisoned. The sheriff may take his body or he may take his goods, and if the goods do not realize the amount of the fine, but realize part of the fine, the provisions of section 15 (5) (*b*) with regard to the reduction of the term of the imprisonment in relation to the proportion of the fine that is paid would apply. But as this is a criminal matter, and not otherwise provided for, I see no reason why the Crown should not sue for the amount of the fine. I still think that it is a debt and, for those reasons, I think that the Crown can sue for the amount of the fine that has been imposed.

It seems to me that it is desirable that the Crown should be able to do so, although the man is dead. I do not want to throw any doubt—in fact I do not think that there could be any doubt thrown—upon the power of the court in cases of this sort, not only to punish a man for a crime which he has committed, but also to take steps to see that he should not benefit by keeping the results of the crime; and I think that it is equally important that, if a man is dead, his estate should not benefit by the proceeds of the crime.

For these reasons, although the point is not an easy one and it is a new point, there must be judgment for the Treasury for the sum of £1,000 and costs.

Judgment for the plaintiff.

Solicitors: *Treasury Solicitor; Speechly, Mumford & Craig for Lamport, Bassitt & Hiscock, Southampton.*

J. F. L.

C. A.

1957
Feb. 27, 28.

Jenkins, Morris and Sellers L.JJ.

LONDON HOSPITAL GOVERNORS *v.* JACOBS (No. 2).

[Plaint No. L. O. 5092.]

Housing — Unfit for human habitation — Underground room — Rent restriction—Repairs and rent—Notice of increase—Proceedings in county court by landlord to recover increase—Whether premises fit for occupation—Standard applicable to underground room—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 12 (2)—*Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *ss.* 9, 23, 49.

In 1931 the plaintiff landlords by an agreement in writing let a dwelling-house protected by the Rent Acts to the husband of the defendant tenant. After the death of the husband the defendant continued in occupation as statutory tenant. After the coming into force of the Housing Repairs and Rents Act, 1954, the landlords served on the tenant a notice of increase of rent and accompanying declaration under section 25 of the Act.[1] Proceedings were brought

---

[1] Housing Repairs and Rents Act, 1954, s. 9: "(1) In determining for "any of the purposes of the principal "Act whether a house is unfit for "human habitation, regard shall be "had to its condition in respect of the "following matters, that is to say— "(*a*) repair; (*b*) stability; (*c*) free-"dom from damp; (*d*) natural light-"ing; (*e*) ventilation; (*f*) water "supply; (*g*) drainage and sanitary "conveniences; and (*h*) facilities for "storage, preparation and cooking of "food and for the disposal of waste "water; and the house shall be "deemed to be unfit as aforesaid if "and only if it is so far defective in "one or more of the said matters "that it is not reasonably suitable "for occupation in that condition."

S. 23: "(1) Where a dwelling-"house is . . . occupied by a statu-"tory tenant, and the landlord is "responsible, wholly or in part, for in the county court to recover the unpaid balance of the increased rent.

The judge rejected the submission that as the premises included an "underground room" or rooms, as defined in section 12 (2) of

the repair of the dwelling-house, then, subject to the provisions of this Part of this Act,—(*a*) if and so long as the following conditions (hereinafter referred to as 'the conditions justifying an increase of rent') are fulfilled, that is to say—(i) that the dwelling-house is in good repair; and (ii) that it is reasonably suitable for occupation having regard to the matters specified in paragraphs (*b*) to (*h*) of subsection (1) of section 9 of this Act; and (*b*) if in accordance with the Second Schedule to this Act the landlord has produced satisfactory evidence that work of repair to the value specified in that Schedule has been carried out on the dwelling-house during the period so specified, the rent recoverable from the tenant shall be increased by virtue of this subsection so as to exceed by the amount hereinafter mentioned the rent which apart from this subsection would be recoverable from the tenant under the terms of the tenancy or statutory tenancy and having regard to the provisions of any enactment. (2) [deals with the amount of an increase referred to as a 'repairs increase' and provides that 'where the landlord is responsible in part only for the repair of the dwelling-house, the amount of the repairs increase shall be reduced proportionately']. (5) [deals with the determination of questions whether the landlord is responsible for repairs]."

S. 25: "(1) No sum shall be recoverable by way of repairs increase unless the landlord has served on the tenant . . . a notice in the prescribed form of his intention to increase the rent (hereinafter referred to as a 'notice of increase'), accompanied by—(*a*) a declaration in the prescribed form that at the date of service of the notice the conditions justifying an increase of rent were fulfilled; and (*b*) a declaration in the prescribed form such as is mentioned in the Second Schedule to this Act. . . . (4) The county court, if satisfied that any error or omission in a notice of increase or a declaration accompanying such a notice is due to a bona fide mistake on the part of the landlord, shall have power to amend the notice or declaration by correcting any errors or supplying any omissions therein which, if not corrected or supplied, would render the notice or declaration invalid, and may exercise the said power on such terms and conditions . . . as appear to the court to be just and reasonable. . . ."

S. 26: "(1) On the service of a notice of increase . . . the tenant . . . may apply to the local authority for a certificate that either or both of the conditions justifying an increase of rent are not fulfilled; and the local authority, if satisfied that the dwelling-house fails to fulfil either or both of the conditions, shall certify accordingly in the prescribed form and the certificate shall be deemed to have been in force as from the application therefor. (2) Where the local authority have granted a certificate . . . then during . . . any period during which the certificate is in force no sum shall be recoverable by way of repairs increase . . . but if the landlord, in proceedings for the recovery of such a sum, satisfies the court that at the time when the certificate was given the conditions justifying an increase of rent were fulfilled, the court shall order that the certificate shall cease to be in force. . . . (4) Where after the giving of a certificate . . . the landlord has executed to the satisfaction of the local authority such work as requires to be executed in order that the dwelling-house shall fulfil both the conditions justifying

C. A.
1957

London Hospital Governors v. Jacobs (No. 2).

the Housing Act, 1936,[2] they could not be "reasonably suitable "for occupation" for the purposes of section 23 (1) (*a*) (ii) of the Act of 1954 because, on the application of the standards prescribed by section 12 (2) of the Act of 1936 and certain regulations made thereunder, they were to be deemed to be unfit for human habitation, notwithstanding that they sufficiently complied with the matters specified in section 9 (1) (*b*) to (*h*) of the Act of 1954. On appeal:—

Held, that section 9 (1) of the Act of 1954 had amended section 12 (2) of the Housing Act, 1936, and the premises, including the underground part, should be deemed to be unfit only if they were so far defective in one or more of the matters specified in paragraphs (*b*) to (*h*) of the Act of 1954 that they were not reasonably suitable for occupation in that condition. Judged on that test the premises were fit for occupation for the purpose of section 23 (1) (*a*) of the Act of 1954 and the landlords were entitled to succeed.

Appeal from Judge Elder Jones, sitting at Shoreditch County Court.

By an agreement in writing dated May 8, 1931, the plaintiff landlords let to Solomon Jacobs, the deceased husband of the defendant tenant, No. 33, Turner Street, Shoreditch, a dwelling-house protected by the Rent Acts, at a weekly rent of £2 7s.

"an increase of rent, the local authority shall on the application of the landlord revoke the certificate. (5) "Where . . . the local authority have refused to revoke a certificate, then if . . . the landlord satisfies the court that at the time of the application both the conditions justifying an increase of rent were fulfilled the court shall order that the certificate shall cease to be in force. . . ."

S. 49: "(1) . . . 'good repair,' in relation to any premises, means that having regard to the age, character and locality of the premises they are in good repair both as respects structure and as respects decoration."

Sch. II: "1. . . . the declaration mentioned in paragraph (*b*) of subsection (1) of section 25 of this Act is a declaration that . . . work of repair of a general description specified in the declaration has been carried out on the dwelling-house to a value not less than three times the amount of the statutory repairs deduction for the dwelling-house. . . . 4.—(1) . . . the tenant may apply to the county court to determine whether work of repair has been carried out . . . and if . . . the court is not satisfied that work of repair has been carried out as aforesaid . . . the court shall certify accordingly and thereupon the notice of increase shall be . . . of no effect. . . ."

[2] Housing Act, 1936, s. 12: . . . "(2) A room the surface of the floor of which is more than three feet below the surface of the part of the street adjoining or nearest to the room, or more than three feet below the surface of any ground within nine feet of the room, shall for the purposes of this section be deemed to be unfit for human habitation, if either—(*a*) the average height of the room from floor to ceiling is not at least seven feet; or (*b*) the room does not comply with such regulations as the local authority with the consent of the Minister may prescribe for securing the proper ventilation and lighting of such rooms, and the protection thereof against dampness, effluvia or exhalation."

C. A.
1957

LONDON HOSPITAL GOVERNORS
v.
JACOBS (No. 2).

The agreement contained a provision whereby the tenant agreed "to keep the said premises in good and tenantable repair (fair "wear and tear excepted) and be responsible for and replace all "broken glass and missing keys." After the death of Solomon Jacobs his widow continued in possession as a statutory tenant, the rent being subsequently raised to £2 14s. 6d. per week on account of increases in the rates.

In May, 1955, the landlords served on the tenant a "notice of "increase" of rent with an accompanying declaration pursuant to section 25 of the Housing Repairs and Rents Act, 1954, requiring her in future to pay £3 6s. 6d. per week. The tenant then applied to the local authority pursuant to section 26 (1) of the Act for a certificate that, owing to certain defects in repair, the conditions specified by section 23 (1) as justifying an increase of rent were not fulfilled. The local authority issued such a certificate, but later revoked it on being satisfied that the landlords had executed the necessary repairs. As the tenant continued in her refusal to pay the increased rent, the landlords instituted proceedings to recover the balance alleged to be due.

At the hearing in the county court, a preliminary objection was taken on behalf of the landlords that, having regard to the provisions of section 26 of the Act, it was not open to the tenant in proceedings in that court to assert that the conditions precedent set out in paragraph (*a*) of section 23 (1) of the Act had not been complied with, as on the proper reading of the Act, her only remedy was to obtain the certificate under section 26 which had been granted and later revoked. The judge accepted this submission, but proceeded to hear certain evidence. Counsel for the tenant then submitted that there was no case to answer as the notice of increase and accompanying declaration were drawn up on the footing that the landlords were responsible in law for the whole of the cost of repairs, whereas under the terms of the original letting, which had not been varied, the landlords were, in the words of section 23 (2), "responsible in part only for the "repair of the dwelling-house," so that the amount of the repairs increase should be reduced proportionally. The county court judge rejected this contention, holding that on the facts the responsibility for all repairs had devolved on the landlords. The tenant appealed, and the Court of Appeal (Lord Evershed M.R., Jenkins and Hodson L.JJ.)[3] held that the county court judge had wrongly excluded evidence or argument by the tenant directed to showing that the conditions justifying an increase in rent had not been complied with, and second, that he had erred in drawing the inference that the landlords had assumed responsibility for the whole of the repairs. The case was, accordingly, remitted to the county court in order that the judge might, under sections 23 (2) and 25 (4), allow, if he thought fit, the appropriate amendments in the landlords' notice of increase and declaration and make the appropriate apportionment of the responsibility for repairs. Liability for repairs was duly apportioned in the county court at 95 per cent. on the landlords and 5 per cent. on the tenant, and the notice and declaration were, with leave, amended.

---

[3] [1956] 1 W.L.R. 662; [1956] 2 All E.R. 603.

At a further hearing before the county court judge evidence as to the condition and state of repair of the premises was given for the landlords by two qualified surveyors, one being the public health inspector for the Borough of Stepney. Both witnesses expressed their conclusion that the dwelling-house was in good repair and that it was reasonably suitable for occupation having regard to the matters specified in paragraphs (*b*) to (*h*) of section 9 (1) of the Act of 1954. A witness also gave evidence for the tenant, but the judge came to the conclusion that he could not believe that evidence and he therefore rejected it wherever it conflicted with the evidence given by the landlords' witnesses. The county court judge again decided in favour of the landlords and the tenant appealed.

George Mercer for the tenant. The landlords are unable to satisfy the conditions of section 23 (1) (*a*) (i) and (ii) of the Housing Repairs and Rents Act, 1954. In particular an underground room does not comply with the Metropolitan Borough of Stepney regulations made under section 12 (2) of the Housing Act, 1936. Accordingly, even though the provisions of section 9 of the Act of 1954 are satisfied, the room is unfit for habitation by virtue of section 12 (2) of the Act of 1936, and the landlords' claim for increased rent must fail.

C. G. Armstrong Cowan for the landlords was not called on to argue.

No cases were cited in argument.

Jenkins L.J., having stated the facts and referred to the sections set out above, continued: It is not in dispute that the landlords' two witnesses, in surveying the premises and in reaching their conclusion as to its being in good repair and reasonably suitable for occupation, considered that they should be guided by the provisions of section 23 (1) of the Act of 1954, and the incorporated provisions of section 9, and also the definition of "good repair" in section 49. Using the requirements of those provisions as a yardstick, they reached the conclusion favourable to the landlords; but they did not take into account the provisions of section 12 (2) of the Housing Act, 1936, and they likewise did not take into account the provisions of paragraph 9 of certain Housing Act regulations issued by the Metropolitan Borough of Stepney.

[His Lordship referred to sections 9 (1) and 12 (1) of the Act of 1936 (as amended in 1949) and continued:] The Metropolitan Borough of Stepney Regulations under the Housing Act, 1936, contain this provision which may be linked with section 12 (2) (*b*) of the Act of 1936: "The room shall be properly ventilated and "lighted by a window or windows, which shall (1) open directly "into the external air; (2) have a total area of not less than one-"eighth of the floor area of the room, a portion of which total area "equal at the least to one-tenth of the floor area of the room, shall "be situated so that from any point thereon a line can be drawn "upwards at an angle of 30 degrees with the horizontal in a ver-"tical plane at right angles to the plane of the window, which will "not intersect any wall or kerb or other obstruction (except an "open fence) within a distance of ten feet measured horizontally "from the window." That, I think, is the material part of the regulation. As to the facts of the present case which bear on the application of section 12 of the Act of 1936 and the Metropolitan Borough of Stepney's regulation which I have read, it is common ground that these premises include a basement room which is of the height of only six feet eleven inches instead of seven feet as required by section 12 (2) of the Act of 1936. As to the window, the judge found (and it is, I think, not in dispute) that, in point of area, the window satisfied the Metropolitan Borough of Stepney's regulation, but it fell short of the requirements of the regulation so far as the angle measured to ground level was concerned.

On those facts and the terms of section 12 (2) of the Act of 1936 and the terms of the Metropolitan Borough of Stepney's regulation, Mr. Mercer, for the tenant, has raised the following ingenious argument: he says the rent cannot be increased under the provisions of section 23 (1) of the Act of 1954 unless the dwelling-house, besides being in good repair, is reasonably fit for

C. A.
1957

London Hospital Governors v. Jacobs (No. 2).

Jenkins L.J.

occupation. He says, on the facts as to the height of the basement room and the facts as to the window, one finds that this room is to be deemed to be unfit for human habitation by the express provisions of section 12 (2) of the Act of 1936. He says it is impossible to hold that a house or a room is reasonably suitable for occupation if it is by statute to be deemed to be unfit for human habitation, and he says that this being so, the judge, in holding that the premises were reasonably suitable for occupation under section 23 of the Act of 1954, committed an error in law. The judge obviously gave careful consideration to that matter, and he found himself prepared to hold that section 12 (2) of the Act of 1936 was amended by section 9 of the Act of 1954; and, in my view, he would have been right in so holding.

[His Lordship read section 9 of the Act of 1954 and went on:] That seems to me to relax the vigour of section 12 (2) of the Act of 1936, for the house is to be "deemed to be unfit as aforesaid if and only if it is so far defective in one or more of the said matters that it is not reasonably suitable for occupation in that condition." Judged by that test, I think on the evidence that this house could not be deemed to be unfit for human habitation. It is to be remembered that the very words "shall be deemed to be unfit for human habitation" in section 12 (2) of the Act of 1936 are repeated in section 9 (1) of the Act of 1954, and there is, of course, a direct reference to the principal Act, the Housing Act, 1936. Therefore, in my view, the judge would have been right in holding that section 9 of the Act of 1954 amended section 12 (2) of the Act of 1936; but he found it unnecessary to decide that point, since in his view the relevant provisions for the present purpose were those contained in sections 9 and 49 of the Act of 1954, and he held on the evidence that those requirements were satisfied and, if they were satisfied, then the claim to the increase in rent was made good. I am in complete agreement with the judge in that part of his reasoning also. Therefore, it does not so far appear that the judge committed any error in law.

[After considering another point not relevant to this report, his Lordship said:] Accordingly, in my view, this appeal fails, and should be dismissed.

Morris L.J. I entirely agree with the judgment that my Lord has just delivered, and I do not think there is anything at all that I can usefully add.

Sellers L.J. I agree. I would not wish to detract from the force and clarity of my Lord's judgment by adding any words of my own.

Appeal dismissed.

Solicitors: *Pearce & Sons; Hanbury, Whitting & Ingle.*

E. D.

CRITCHELL *v.* LAMBETH BOROUGH COUNCIL.

C. A.
1957
May 3, 6, 7.

Lord Evershed M.R., Morris and Pearce L.JJ.

Housing — Unfit for human habitation — Underground room — Non-compliance with local authority regulations — Closing order — Standard of fitness applicable — "House" — Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 12 (2) *— Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 9.
Statute—Repeal—Implied repeal—Housing Acts.
Judicial Precedent—Court of Appeal decision—Per incuriam—Point not fully argued.

By section 12 (2) of the Housing Act, 1936, an underground room is to be deemed unfit for human habitation if (a) it is not of a minimum height or (b) does not comply with regulations as to ventilation, lighting and protection against dampness, effluvia and exhalation, made by a local authority under that section. Section 9 (1) of the Housing Repairs and Rents Act, 1954, directs that in determining for the purposes of the Act of 1936 whether a house is unfit for human habitation regard is to be had to eight specified matters and the house is to be deemed unfit only if it is so far defective in one or more of the matters that it is not reasonably suitable for occupation in that condition.

On appeal against a closing order made in 1956 in relation to underground rooms which did not comply fully with regulations made by the local authority:—

Held, that section 9 (1) of the Act of 1954 had superseded the tests of unfitness for underground rooms provided in section 12 (2) of the Act of 1936, and that the closing order was, therefore, invalid.

London Hospital Governors v. *Jacobs* (*No.* 2), ante, p. 528, applied.

That decision bound this court although the point was far less fully argued in that case.

Appeal from Judge Clothier sitting at Lambeth County Court.

On October 8, 1956, the Lambeth Borough Council made a closing order in respect of three rooms, a scullery and lavatory

C. A.
1957

CRITCHELL
v.
LAMBETH
BOROUGH
COUNCIL.

accommodation in the basement of No. 88, Herne Hill, London, which were said to be unfit for human habitation and incapable of being rendered fit at a reasonable cost. The rooms were occupied by a family named Collins, and the owner of the house, Mrs. Critchell, occupied the upper part of the house with her husband.

The order was based on section 12 (2) of the Housing Act, 1936,[1] and certain regulations made by the council thereunder. The owner appealed to the county court, alleging that, by reason of section 9 of the Housing Repairs and Rents Act, 1954,[2] the order could not be validly made under section 12 (2) of the Act of 1936 and the council's regulations. The county court judge decided in her favour and quashed the order. The council appealed. On appeal it was not disputed by the owner that if the council were entitled to rely on section 12 (2) and the regulations, the rooms or some of them did not in all respects comply with the regulations and that the order was on that footing valid. It was common ground that paragraph *(a)* of section 12 (2) had no application as the rooms were not less than seven feet in height on the average from floor to ceiling.

Kenneth Jones for the council. Section 9 of the Housing Repairs and Rents Act, 1954, does not apply to an underground room within section 12 of the Act of 1936. It applies only to "houses." There is no definition of "house" but the meaning must be the same as in sections 9, 10 and 11 of the Housing Act, 1936, where it is distinguished from "underground room" in section 12 of that Act. In the Act of 1936 when " house " means a separate dwelling and not a house in the bricks and mortar sense, clear language to that effect is used: see section 2 (3).

---

[1] Housing Act, 1936, s. 12: . . . "(2) A room the surface of the floor "of which is more than three feet "below the surface of the part of the "street adjoining or nearest to the "room, or more than three feet below "the surface of any ground within "nine feet of the room, shall for the "purposes of this section be deemed "to be unfit for human habitation, if "either—*(a)* the average height of "the room from floor to ceiling is not "at least seven feet; or *(b)* the room "does not comply with such regula-"tions as the local authority with "the consent of the Minister may "prescribe for securing the proper "ventilation and lighting of such "rooms, and the protection thereof "against dampness, effluvia, or exha-"lation."

[2] Housing Repairs and Rents Act, 1954, s. 9: "(1) In determining for "any of the purposes of the principal "Act whether a house is unfit for "human habitation, regard shall be "had to its condition in respect of the "following matters, that is to say—"*(a)* repair; *(b)* stability; *(c)* free-"dom from damp; *(d)* natural light-"ing; *(e)* ventilation; *(f)* water "supply; *(g)* drainage and sanitary "conveniences; and *(h)* facilities for "storage, preparation and cooking of "food and for the disposal of waste "water; and the house shall be "deemed to be unfit as aforesaid if "and only if it is so far defective in "one or more of the said matters that "it is not reasonably suitable for "occupation in that condition."

In *London Hospital Governors* v. *Jacobs* (*No.* 2)[3] Jenkins L.J. said that he would be prepared to hold that section 12 of the Act of 1936 had been amended by section 9 of the Act of 1954, but he did not say how far the amendment went, nor did he actually decide the point, which was unnecessary for decision in that case. Section 9 of the Act of 1954 and section 12 (2) of the Act of 1936 are not mutually repugnant; they can exist side by side, and it should not be inferred that the new code of fitness prescribed by section 9 in relation to a " house " has abrogated the standard imposed by section 12 of the Act of 1936. It would not be unreasonable for the rule of thumb standard to continue to apply to underground rooms, for the considerations applicable to them differ from those applying to other premises.

The Act of 1954 has expressly preserved the previously existing provisions relating to back-to-back houses, but no express exception was needed in relation to underground rooms, which are not " houses " in the relevant sense. If Parliament had intended to repeal section 12 (2) of the Act of 1936, it is reasonable to expect that it would have been done expressly, as was done with section 188 (4). " Byelaws " in section 188 (4) of the Act of 1936 are those contemplated by section 11 (4), not local authority regulations contemplated by section 12 (2) of that Act.

E. Gavin Freeman for the owner. The order made by the council is invalid, for they have not had regard to section 9 of the Act of 1954, which now applies to all types of houses except back-to-back houses. The express exclusion of that type of property precludes any inferred exclusion of other types.

The standard of fitness applicable to a house and to a room or rooms is the same since 1954. Section 11 of the Act of 1954 shows that the section 9 standard applies to a house let in lodgings just as it applies to a house. It would be very strange if the standard should be different for a flat which happened to be underground.

The council have not applied section 9 of the Act of 1954 at all; they have relied solely on their regulation and have made the closing order because the flat offended in a single respect. Even if the standard of section 12 of the Act of 1936 has not been entirely superseded by section 9 of the later Act, but should be considered with it, this flat would not necessarily be "so far "unfit" that it should be deemed unfit under section 9.

---

[3] Ante, pp. 528, 534.

It was an essential part of the reasoning in *London Hospital Governors* v. *Jacobs* (*No.* 2)[4] that no regard should be had to section 12 in determining whether premises were or were not fit for human habitation.

The premises are a "house" within section 9 of the Act of 1954. They comprise a self-contained flat and, apart from being underground, are indistinguishable from a penthouse, which would admittedly be within section 9. "House" includes a part of a house which is a separate dwelling, except where the context otherwise requires: see section 188 (3) of the Act of 1936. Section 188 (3) is not limited to apply exclusively to Part V of the Act but also applies generally, and particularly to Part II of that Act. Section 50 of the Act of 1949 also shows clearly that, except where the context otherwise requires, a part of a house is a "house" for the purposes of the Act of 1936. Section 12 (2) of the Act of 1936 supplies a contrary context, but it applies only to underground rooms, not to flats which are underground.

There is no relevant distinction between byelaws and regulations—the repeal of section 188 (4) makes it quite plain that no regard is to be had to local authority regulations in determining whether premises are fit for human habitation or not: see *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*.[5] [Reference was also made to the Public Health (London) Act, 1936, s. 132.]

K. Jones replied.

LORD EVERSHED M.R. stated the facts, read section 12 (2) of the Housing Act, 1936, and continued: In my judgment, in this court we are bound to answer the present question in Mrs. Critchell's favour by reason of a decision of this court in *London Hospital Board of Governors* v. *Jacobs* (*No.* 2),[1] decided on February 28, 1957.

Having regard, however, to the difficulties of the case, and out of respect to the argument which has been put forward on the council's behalf by Mr. Kenneth Jones, I shall make some references to the relevant sections of the Acts. I begin with section 9 of the Act of 1936. That section empowers a local authority to require insanitary houses to be properly repaired. The text of subsection (1), as it originally ran, reads: "Where

---

[4] Ante, p. 528.

[5] [1892] 3 Ch. 242; 8 T.L.R. 717.

[1] Ante, p. 528.

"a local authority, upon consideration of an official representa-"tion, or a report from any of their officers, or other information "in their possession, are satisfied that any house which is "occupied, or is of a type suitable for occupation, by persons "of the working classes is in any respect unfit for human "habitation," etc.

By the Housing Act, 1949, the reference to persons of the working class, perhaps in accordance with changed social views, was eliminated from the principal Act, and, as will later appear, certain other words were in other sections inserted. But from what I have so far read it will be observed, first, that the section is dealing in terms with a house and, second, it is dealing with the case where such a house is unfit for human habitation.

Going ahead somewhat, I further note that there is nowhere in this part of the Act of 1936 any statement of the standards of fitness or unfitness for human habitation. But by subsection (4) of section 188 of the same Act it is stated: "In determining for "the purposes of this Act whether a house is fit for human "habitation, regard shall be had to the extent, if any, to which "by reason of disrepair or sanitary defects the house falls short "of the provisions of any byelaws in operation in the district or "of any enactment in any local Act in operation in the district "dealing with the construction and drainage of new buildings," etc.

Without, therefore, saying that the test is exclusively one by reference to local byelaws, it is at least true to say that the scheme of the Act of 1936 contemplated that local authorities for their various respective districts would promulgate byelaws to which regard should be had on the question: Aye or No, was a house in any district fit for human habitation?

I go back now to section 10 of the Act of 1936, which is a section directed to enforcement of a notice requiring the execution of works, where the council has come to the conclusion that such works are requisite to render the house properly fit for human habitation.

Then in section 11 is found the power of the local authority, in certain circumstances, to order demolition of unfit houses. Thus in subsection (1) it is stated: "Where a local authority ". . . are satisfied that any house . . . is unfit for human "habitation and is not capable at a reasonable expense of being "rendered so fit," then certain proceedings may be taken. The authority first serve on the owner and certain other persons, if they can be discovered, what has been referred to as a "time "and place notice," that is, a notice that the person served should attend at a certain time and place, if he wishes it, and make such representations to the authority about the premises as he desires; and upon that the authority may accept an offer by the owner to do work which would make the house in their view properly fit for habitation. But, if no such undertaking is given or if the work is not carried out, then the authority, by subsection (4), is given power to demolish the unfit house.

I have stated that these sections relate in terms to what is called "a house." There is in the Act only this definition of "house." Subsection (3) of section 188 provides: "For the "purposes of any provisions of this Act relating to the provision "of housing accommodation, the expression 'house' includes, "unless the context otherwise requires, any part of a building "which is occupied or intended to be occupied as a separate "dwelling." It is one of the obscurities which Parliament has presented to the courts in this Act that it is not clear whether that definition is intended to cover the sections which I have read or not.

The Part of the Act which is directly concerned with the provision of housing accommodation is Part V of the Act, not the part in which sections 9, 10 and 11 occur. But, as was pointed out by Mr. Freeman, the subsection I have last read does not say "for the purposes of Part V of the Act." On the other hand, there are undoubtedly other sections (for example, as Mr. Jones observed, sections 34 and 35 in Part III of the Act) which might be said to relate to the provision of housing accommodation, and Mr. Jones urged with some force that the provisions for demolition of unfit houses can at best only somewhat obliquely be referred to as provisions for providing housing accommodation.

But, in any case, in my judgment the three sections which I have read use the word "house" in their context as meaning what is commonly called a house—that is, a separate structure.

So much, I think, appears plainly enough from the last of the three sections to which I have alluded; for clearly you could only sensibly demolish a house which is itself a distinct and separate entity. That view of the matter is made still more clear to my mind by the terms of section 12, to the second subsection of which I have already referred. The first subsection as amended by the Act of 1949 reads: "A local authority may under this "Part of this Act take the like proceedings in relation to any "part of a building which is used, or is suitable for use, as a "dwelling; or in relation to any underground room which is for "the purposes of this section to be deemed to be unfit for human "habitation, as they are empowered to take in relation to a "house, subject, however, to this qualification that, in circum-"stances in which, in the case of a house, they would have made "a demolition order, they shall make a closing order prohibiting "the use of the part of the building or of the room, as the case "may be, for any purpose other than a purpose approved by the "local authority." I need not read more of subsection (1). Then follows subsection (2), which I have already read, save for the proviso which I need not take time to read also.

The effect of section 12 (1), on the face of it, seems to be this. It is saying that as regards part of a building, provided that that part is unfit for human habitation, the local authority may take the same steps or proceedings in regard to it as they can in regard to a house: videlicit, they can serve a time and place notice. They can hear any proposals of the owner; they can accept them, or, if none are made or if they are not acceptable or not carried out, they can make—here comes the one variation—not a demolition order, but a closing order.

Underground rooms or basements, as in the present case, may clearly constitute part of a building used or suitable for use as a dwelling, and prima facie the same would therefore follow for them. The difficulty for present purposes is created by the circumstance that subsection (2) adds, not a variation to the procedure, but a different test as to fitness in regard to underground rooms whether or not, as I follow the language, the underground rooms themselves are a separate dwelling. I do not re-read subsection (2), but it will be remembered that the vital formula is that an underground room "shall *for the "purposes of this section* be deemed to be unfit for human "habitation"; and that picks up the formula in subsection (1) of the same section, "or in relation to any underground room "which is for the purposes of this section to be deemed to be "unfit for human habitation." It seems to me, therefore, that, as matters stood before the passing of the Act of 1954, in the case of an underground room (whether other tests could be resorted to or not) if it was shown that the room or rooms failed to comply (to take my example from paragraph (*b*)) with regulations or one of the regulations made in accordance with the subsection by the local authority, then that room or rooms was or were deemed to be unfit, and the procedure which by reference the local authority could take with regard to a house they could then proceed to take with regard to the underground room, with the same variation as with part of the building, namely, that in lieu of the demolition order they could make a closing order.

That was how matters stood. I have referred to the circumstance that by the Housing Act, 1949, the reference to persons of the working class was eliminated, but, as I have mentioned that Act, it is perhaps pertinent to observe that further difficulties have been created for those whose function it is to understand and administer these Acts, by section 50 of the Act of 1949, which says that " 'house' includes any part of a building, "being a part which is occupied or intended to be occupied as "a separate dwelling, and, in particular, includes a flat." It was provided that that Act might be cited together with the Act of 1936 as the Acts of 1936 to 1949. I make that reference because Mr. Freeman has somewhat relied upon the definition as showing that "house" in these Acts may generally be used by Parliament so as to comprehend part of a house used as a separate dwelling.

It is with that in mind that I now turn to section 9 of the Housing Repairs and Rents Act, 1954. [His Lordship read section 9 (1) and continued:] Subsection (2) relates to back-to-back houses and preserves the pre-existing law as laid down in the principal Act as regards back-to-back houses.

Subsection (3) provides: "The following enactments shall "cease to have effect . . .: (*a*) subsection (4) of section 188 of "the principal Act (which requires account to be taken of local "byelaws in determining whether a house is fit for human "habitation); and (*b*) so much of any local enactment as specifies "defects by reason of which a house is to be deemed for the "purposes of section 9 of that Act not to be in all respects fit "for human habitation, or regulates the matters to be taken into "consideration on an appeal," etc.

So anxious was Parliament to make it clear that subsection (4) of section 188 was to cease to have effect that it was also expressly repealed in the Fifth Schedule to the Act; but it will be observed that nowhere is any reference whatever made to underground rooms or to section 12 (2) of the principal Act. It is also to be observed that the existing provisions in regard to back-to-back houses was expressly reserved. It was therefore said that if the pre-existing provisions as to underground rooms were to be preserved Parliament might well have said so, as indeed it might. But per contra, and with certainly no less force, it was said that if Parliament desired to amend or repeal subsection (2) of section 12 it might have said so, as it said with so much emphasis as regards section 188 (4). The Act is quite silent as to what Parliament meant by the word "house."

It is in those circumstances that the considerable difficulties of the present case have been presented to us. If the matter were res integra I should, I confess, feel that there was, to say the least, very great force in the argument which Mr. Kenneth Jones has put forward for the council. Putting it quite briefly, what he says is this: section 9 of the Act of 1954 enjoins a new test for unfitness which takes the place of the test by reference to byelaws or otherwise which you find in the Act of 1936 as applicable to a house, and, if you will, by reference to a part of a house; but that there is nothing which disables or supersedes the special provisions which in the case of underground rooms provide tests of unfitness for human habitation.

In support of that argument a number of points were taken. In the first place, it may well be said that special considerations are naturally and properly applicable to underground rooms. The test of human habitation by reference to such things as ventilation, dampness, drainage and so forth, when you come to rooms which are to a substantial extent below ground, may reasonably require the convenience and simplicity of what one might call rule of thumb regulations. That they are somewhat special is, I think, also recognized by Parliament; for in another Act, the Public Health (London) Act, 1936, in section 132, you find a considerable code dealing with restrictions on the use of underground rooms as dwellings.

Then second, says Mr. Jones, if you take section 9 of the Act of 1954 as replacing, so far as requisite, the provisions of sections 9, 10 and 11 of the Act of 1936 (that is to say, in so far as those sections indicate the test of unfitness for human habitation by substituting the new statutory test of section 9 of the Act of 1954), there is nothing which prevents section 12 still fitting in with the legislation so amended. It would, in other words, have been quite possible to rewrite sections 9, 10 and 11 of the Act of 1936 so as to anticipate and to give effect to section 9 of the Act of 1954 and still to leave section 12 exactly as it stands; section 12 would still fit, and subsection (2) would only apply a different, and, if you will, a more artificial test, for underground rooms as a condition precedent for the taking of the various steps which by reference you can take in the case of a part of a house used as a dwelling.

It is then pointed out that the courts do not lightly construe one Act of Parliament as impliedly repealing another, unless reasonably clear language is used, particularly where the Act in question itself contains a schedule indicating what exactly has been repealed in the earlier legislation. I have already stated that particular care was taken to say that section 188 (4) should cease to be applicable, and it is perhaps strange indeed, if Parliament intended that this new section 9 of the Act of 1954 should supersede the old provisions as to underground rooms, that Parliament should not have said so. I bear in mind that the provision I have read from subsection (3) of section 9 of the Act of 1954 states that byelaws shall cease to have effect, and I quite agree with Mr. Freeman that there is no mystic distinction between a byelaw, on the one hand, and a regulation, on the other; but, to put it no higher, it seems to me that there is very great force in Mr. Kenneth Jones' submission that, in the context of subsection (3), the byelaws referred to are the byelaws contemplated by section 11 (4) of the Act of 1936 and have nothing to do with the regulations which are contemplated by section 12 (2).

If, therefore, the matter had been res integra, I should have felt, to say the least, a strong inclination towards Mr. Kenneth Jones' view. But I think it would be wrong for us to arrive at a conclusion in conflict with what this court said in *London Hospital Board of Governors* v. *Jacobs* (*No.* 2),[2] although the point in that case was a different one.

That case arose out of section 23 of the Housing Repairs and Rents Act, 1954. Section 23 empowers the landlord of a dwelling-house let under a controlled tenancy to increase the rent to the extent and in the manner there provided, subject to certain conditions. Those conditions are found in subsection (1) (*a*): namely, " (i) that the dwelling-house is in good repair; " and (ii) that it is reasonably suitable for occupation having " regard to the matters specified in paragraphs (*b*) to (*h*) of " subsection (1) of section 9 " of that Act.

In the case I am referring to, the point was taken by Mrs. Jacobs (perhaps oddly taken by the tenant but still it was taken by her) that the Board of Governors of the London Hospital were unable to satisfy the second of the conditions I have read (she did in fact challenge both conditions, but for present purposes the second is the important one) in that one of the rooms in the house, being a basement or underground room, was less than seven feet high, being only six feet eleven inches, and secondly, because, as regards the angle of one of its windows, it was not in compliance with the regulations made by the Borough of Stepney under section 12 (2) of the Act of 1936. Therefore, she said, however much in other respects the London Hospital were able to show that the provisions of section 9 were satisfied, they were bound to concede by the express terms of section 12 (2) and the regulations that part of the house, namely, this room, was unfit for human habitation and that therefore their claim for increased rent must fail.

---

[2] Ante, p. 528.

The leading judgment was delivered by Jenkins L.J., and Morris L.J. was also a member of the court. He tells me that in fact the court only heard the argument of Mr. Mercer of counsel, who appeared for Mrs. Jacobs. The court was therefore perhaps less fortunate than this court, which has had close argument presented on both sides by Mr. Kenneth Jones and Mr. Freeman.

It is true that that case turned upon section 23 of the Act of 1954, and, in so far as section 9 was introduced by reference, it could be said that, if looking at section 23 and section 9 you could say that all the conditions there set out were satisfied, you need not trouble yourself at all about the regulations which the Borough of Stepney had made under section 12 (2) of the Act of 1936. That is strictly so. None the less Jenkins L.J. (with whom the other members of the court agreed) stated quite clearly, and more than once, that section 9 of the Act of 1954 had superseded section 12 (2) of the Act of 1936, so as to provide in regard to underground rooms the sole standard for fitness or unfitness for human habitation, and so as to render no longer operative for that purpose the provisions of section 12 (2) in the Act of 1936 or any regulations made thereunder.

I think it would be wrong for this court to introduce into a matter already in all conscience complicated enough, and made complicated by what I cannot help feeling to be the imperfections of the drafting of these Acts, refinements and narrow distinctions between cases which might fall under one section rather than another of the same legislation. Having regard to the clear view expressed by Jenkins L.J., with the concurrence of his brethren, that the rigours of section 12 of the Act of 1936 had been mitigated by section 9 of the Act of 1954, and that the former section had been by the latter amended, it would be wrong for us now to say that the test of fitness for habitation of underground rooms might be different under different sections of the same legislation, and that though section 12 (2) of the Act of 1936 must be treated as superseded for some purposes, for other purposes, for the purposes of this closing order, it was not so, and section 12 (2) and the regulations and orders made thereunder remained in full force and effect.

For those reasons, therefore, I come to the conclusion that this appeal should be dismissed.

MORRIS L.J. I am also of the opinion that the appeal should be dismissed. Mrs. Critchell is the owner of a building, to use a neutral term, known as 88, Herne Hill. The lower part of that building has been let off to a family named Collins. It is in respect of that part of the building that a closing order was made. The order now under appeal is headed as follows: "In the matter of "the Housing Act, 1936, and in the matter of the basement front "and back rooms, front off-room and scullery, being part of the "building situate at 88, Herne Hill." The effective part of the order of the court reads: "It is adjudged that this appeal be "allowed and that the closing order dated October 8, 1956, in "respect of the above-mentioned part of a building be quashed."

There has been no consideration of the question whether, if the tests laid down by section 9 of the Housing Repairs and Rents Act, 1954, are applied, that part of 88, Herne Hill, would or would not satisfy the standards imposed by that section. But the rooms which are in the basement at 88, Herne Hill, are rooms which are all what may be called underground rooms as defined in section 12 of the Housing Act, 1936. It is said, therefore, that, as these are underground rooms, the closing order was properly made without there being any necessity to apply the tests of section 9 of the Housing Repairs and Rents Act, 1954. That is the point that is involved in this appeal.

It might seem rather strange if the position was that if this basement is called a "part of a building," then the closing order would have been incorrectly made, but, if it is referred to as being a number of underground rooms which are deemed to be unfit for human habitation under section 12 (2) then the closing order would have been correctly made.

Questions of construction of great difficulty arise in this case, and these have been stated by my Lord, if I may respectfully say so, with great force and clarity. My Lord has referred to the relevant sections: accordingly, I need not recite any of those sections, but merely refer to them for the purpose of expressing a view in regard to some of the questions which arise.

Under section 12 of the Housing Act, 1936, a local authority may take the like proceedings in relation to, firstly, any part of a building which is used or is suitable for use as a dwelling, and, secondly, in relation to any underground room which is, for the purposes of section 12, to be deemed to be unfit for human habitation, as may be taken in relation to a house. But there is one qualification, which is that in circumstances in which in the case of a house a local authority would have made a demolition order, in the case of part of a building or an underground room they are to make a closing order which will prohibit use other than for an approved purpose. The operative words are: "subject, however, "to this qualification that, in the circumstances in which, in the "case of a house, they would have made a demolition order." These words make it necessary to refer back to section 11 and to pose the question: what are the circumstances in which a demolition order would have been made?

Section 11 begins by referring to the consideration of an official representation or a report from officers or other information. Official representation is defined in the Act. The start of the matter is that the local authority should have official representation or a report from officers or other information. The section then proceeds: "Where a local authority, upon consideration" of those, "are satisfied that any house . . . is unfit for human "habitation"—"satisfied" there, it seems to me, must mean "prima facie satisfied" or "satisfied" in the first place, because the section goes on to provide that there is to be a meeting at which the question is to be considered, and at which meeting the owner of the property may be heard: so the local authority must be satisfied that the house is unfit for human habitation, and they must be satisfied that the house is not capable at reasonable expense of being rendered so fit. If the stage of satisfaction on those matters is reached, then a notice of time and place is served and, amongst other matters which may be considered, if an appointment is kept, is the condition of the house; another matter is any offer with respect to the carrying out of works or any propositions in regard to the future user of the house which the owner may put forward. The owner who is served is entitled to be heard. Afterwards the authority may accept some undertaking, or in the various circumstances which are set out, they may exercise the powers given by section 11 (4) and they may make a demolition order.

Before the passing of the Act of 1954 it seems to me that no real difficulty arose in fitting in sections 11 and 12. If a house was being considered, then section 11 provided what was to be done. If a part of a building was being considered, then in reference to such part of the building the local authority would have to be satisfied that it was unfit for human habitation. If an underground room was being considered, then section 12 (2) set out the circumstances under which such room was deemed to be unfit for human habitation for the purposes of that section. Therefore, when proceeding (in the case of an underground room) to comply with the provisions of section 11, the local authority would have no difficulty in regard to the first matter, namely, whether the room was unfit for human habitation. In considering questions under section 11 in regard to a house, as to whether the house was unfit for human habitation, the local authority was enjoined to have regard to any byelaws or to any enactments in a local Act.

Then came the provision of section 9 of the Housing Repairs and Rents Act, 1954, which laid down the standard of fitness for human habitation to be adopted. By the provisions of subsection (3) the result is that certain enactments are to cease to have effect. It is forcefully said on the one hand that there is no repeal of section 12 (2) of the Act of 1936. On the other hand, it is said, with great force, that though it is provided by section 9 (2) that the provisions of subsection (1) are to be without prejudice to section 22 of the principal Act (which provides that certain back-to-back houses are to be deemed for the purposes of that Act to be unfit for human habitation) there is no express saving in regard to underground rooms.

Either view of this matter presents difficulty. But it seems to me that, reading section 11 of the Act of 1936 with section 12, the result is that where a local authority, upon consideration of the various matters which they must consider, are satisfied in regard to (a) any house, or (b) any part of a building which is used or suitable for use as a dwelling, or (c) any underground room which is for the purposes of section 12 to be deemed unfit for human habitation, that it is unfit for human habitation and not capable at reasonable expense of being rendered so fit, then the various steps that section 11 enjoins must be taken in reference either to the house or to the part of a building which is used or suitable for use as a dwelling or to the underground room.

The procedure which section 11 laid down in relation to a house is, as it seems to me, by section 12 applied, subject to one modification, to (a) any part of a building which is used or suitable for use as a dwelling, and (b) an underground room which for the purposes of section 12 is deemed to be unfit for human habitation.

The effect of section 9 of the Act of 1954 is to impose standards of fitness which, though indeed comprehensive, will permit of the occupancy of premises whose condition makes them reasonably suitable for occupation. Regard is to be had in determining for any of the purposes of the Act of 1936 whether a house is unfit for human habitation, to the condition of premises in respect of repair, stability, freedom from damp, natural lighting, ventilation, water supply, drainage and sanitary conveniences, and facilities for storage, preparation and cooking of food and for the disposal of waste water. But when all those are considered, the conclusion which is to be arrived at is one of reasonable suitability for occupation. Even if in the respects denoted there are some defects, then a house is to be deemed to be unfit for human habitation only if it is not reasonably suitable for occupation. Though it is provided that subsection (1) is to be without prejudice to section 22 of the principal Act, there is, as I have indicated, no special provision or special saving or exclusion relating to underground rooms.

Although I am most conscious of the difficulties of construction, it seems to me that section 9 of the Act of 1954 imposes the standard of reasonable suitability for occupation, which standard will displace the rigidity of other standards or of particular provisions in byelaws or enactments, and that because by the operation of sections 11 and 12 of the Act of 1936 closing orders in reference to a part of a building or an underground room may be made in circumstances in which a demolition order could be made in the case of a house, the new standard under section 9 of the Act of 1954 is to be applied in three cases: (a) when a house is being considered, (b) when part of a building used as a separate dwelling is being considered, or (c) when an underground room which, for the purposes of section 12, is deemed to be unfit for human habitation is being considered. It may be that the standards of section 12 were left as standards subject to the overriding provisions of section 9 which are now introduced into section 11.

For those reasons I therefore consider that the judgment of the county court judge should be upheld, and those are additional to the reason which my Lord has stated in his judgment, namely, that this court in the previous case to which my Lord has referred came to a decision which is binding upon us.

C. A.
1957
Critchell
v.
Lambeth
Borough
Council.

Pearce L.J. I agree. I feel the difficulties so clearly expressed by my Lords, and I share their conclusion that we ought not to depart from the clear view taken by this court in *London Hospital Board of Governors* v. *Jacobs (No. 2).*[3]

Appeal dismissed.

Solicitors: *John E. Fishwick; Seifert, Sedley & Co.*

E. D.

---

[3] Ante, p. 528.

1957
May 15, 24.

Lord Goddard C.J., Hilbery and Devlin JJ.

HUGHES *v.* ARCHITECTS' REGISTRATION COUNCIL OF THE UNITED KINGDOM.

Architect—Discipline—Architects' Discipline Committee—Appeal from —"Disgraceful conduct"—Meaning—Registered architect practising as architect and estate agent—Combined practice contrary to code drawn up subsequent to architect's registration—Removal from register—Power of court to review committee's decision—Effect of code on architect—Architects (Registration) Act, 1931 (21 *&* 22 *Geo.* 5, *c.* 33), *ss.* 7 (1), 9.

Tribunal—Statutory—Control by courts—Discipline Committee of Architects' Registration Council—Jurisdiction of court.

In 1934, H., who had been in practice as an architect, surveyor, land and estate agent and valuer since 1922, became registered as an architect under the Architects (Registration) Act, 1931. In 1936 the Architects' Registration Council drew up a code which provided that it was not permissible for a registered architect also to practise as a surveyor, land or estate agent or valuer. The discipline committee of the council found H. guilty of disgraceful conduct in his capacity as an architect, on the ground that he refused to confine his practice to architecture, and on December 14, 1956, the council disqualified him from practising for two years. On appeal against this decision:—

Held, (1) that by virtue of section 9 of the Architects (Registration) Act, 1931, the court sat as a court of appeal and was entitled to review the decision of the council and decide whether that decision was right and could be upheld.

Allender v. *Royal College of Veterinary Surgeons* [1951] W.N. 527; [1951] 2 T.L.R. 872; [1951] 2 All E.R. 859 applied.

Allinson v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750; 10 T.L.R. 304 and *Rex* v. *General*

[Reported by David Calcutt, Esq., Barrister-at-Law.]

Council of Medical Education and Registration [1930] 1 K.B. 562; 46 T.L.R. 197 distinguished.

(2) That since H. was in practice as an architect and estate agent long before the code was introduced he was not bound by it and his action in failing to observe its terms could not amount to disgraceful conduct; accordingly, the council were not entitled to strike his name off the register.

Per Devlin J. It is not in itself disgraceful to disagree with a majority view and act accordingly. It is only if a man has bound himself in honour to accept that view and to act according to the code that a deliberate breach of the code for his own profit can be called disgraceful.

APPEAL under section 9 of the Architects (Registration) Act, 1931.

The appellant, Thomas Hughes, had entered into articles in 1919 and had been in practice as an architect, chartered surveyor, land and estate agent and valuer since 1922 either in partnership or on his own account. In 1931 the Architects (Registration) Act, 1931, which established the Architects' Registration Council, provided that architects then in practice could apply for registration, and thereafter call themselves registered architects. The appellant became a registered architect in 1934.

In 1936 the council published for the guidance of the profession and with the object of providing a general standard of professional conduct the first Code of Professional Conduct. Paragraph 2 (*f*) of the code provided that "A registered architect "must not . . . permit the business of auctioneering or house "agency to form part of his practice." The council, however, recognizing the vested interests of those architects who had been engaged in business as house agents for many years, resolved not to take action against those who had been so engaged at the time of their registration.

In 1937 the president of the council wrote to the Institute of Chartered Surveyors recognizing the fact that there was nothing in a Bill, which the council was then promoting (and which subsequently became the Architects Registration Act, 1938) to interfere with the activities of registered architects.

In January, 1949, the council published a memorandum which provided in paragraph 3 ("Additions to the Code of Conduct") that after January 1, 1956, no architect would be permitted to act as a house agent or auctioneer in any circumstances; and that the concession, made in 1936, to architects who had been carrying on such undertakings before they were registered, would be withdrawn on that date.

1957

Hughes
v.
Architects'
Registration
Council of
the United
Kingdom.

At a meeting of the Discipline Committee of the council, held on July 17, 1956, a complaint was considered against the professional conduct of the appellant in his capacity as an architect. The committee found as a fact that the appellant admitted that he knew that the Royal Institute of British Architects had, so long ago as 1919, expressed the view that carrying on the professions of architect, chartered surveyor, land and estate agent and valuer, together was wrong. The appellant also admitted that he knew that the council's code, published in 1936, contained a prohibition against an architect permitting the business of auctioneering or house agency to form part of his business. The appellant further admitted that he knew that the architects' profession as a whole was against the practice of the business of a house agent forming part of an architect's practice; that he knew that for at least the seven years preceding the meeting of the committee the profession as a whole had wanted to fix a final date when the separation of the two callings should become final; and that he knew that in January, 1949, the council had issued to all architects on the register a memorandum of the decision to enforce seven years later, viz., January 1, 1956, the prohibition against any architect engaging in work as a house agent or auctioneer, whatever his practice had been in the past.

The appellant, it was further found, had discussed his position in correspondence with the registrar of the council, and ultimately, in December, 1955, it had been pointed out to him that if he failed to comply with the rule after January 1, 1956, he might lay himself open to a complaint of disgraceful conduct. The appellant had failed to comply with the rule, and admitted that, at the time of the meeting, he was still failing to comply with it.

The committee reported to the council that it found that the appellant had been guilty of conduct disgraceful to him in his capacity as an architect in that knowing (a) that the architects' profession as a whole was opposed to the practice of an architect carrying on business of a house agent, (b) that this view of the profession as a whole had been expressed in the rules of conduct published for the guidance of its members by the council as the code of professional conduct, and (c) that the code, in conformity with the views and wishes of the profession as a whole recommended that all architects, whatever their former practice had been, should, from January 1, 1956, cease to contravene the standards set by the profession in this respect, he had nevertheless refused to comply with this standard and had expressed his intention of continuing to disregard the views of the profession as a whole and to continue to engage in the business of a house agent because to do otherwise would have conflicted with his own views and personal interests.

In arriving at its decision the committee had been impressed by the tests suggested by counsel for the respondent, which were apparently accepted as fair by counsel for the appellant. Counsel for the respondent had said: "First, . . . does the code correctly "embody and express the standard that the profession has set "itself? If it does that, secondly, . . . is that standard a right "and proper and reasonable one?" If the committee think that it is, "then thirdly, would any honourable and right-minded "member of the profession deliberately disregard that standard "in the pursuit of his own private interests?" The committee found the answers to the first two questions to be "Yes," and the answer to the third "No," and that the appellant had been deliberately and knowingly flouting, because of his own private interests, the standard which the profession as a whole had set itself and which had been set out in the code of conduct. The committee, in finding the appellant guilty of disgraceful conduct, wished to make it clear that they did not mean "disgraceful" in the popular sense of the word, but disgraceful to him in his capacity as an architect.

At a meeting held on December 14, 1956, the council accordingly resolved "that this council direct the registrar to "remove the name of Thomas Hughes from the register, and "that this council determine that the said Thomas Hughes is "disqualified from registration for a period of two years from "this date. . . ." It was against this resolution that Hughes appealed.

Gerald Gardiner Q.C. and *Neville Faulks* for the appellant. The Architects' Registration Council has not the power to make regulations preventing an architect from practising as an estate agent. Such regulations, imperative in their terms, are ultra vires the council: *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee.*[1] The effect, moreover, of such regulations would be to negative an Act of Parliament. Parliament sought to protect the interests of those in practice at the time of the passing of the Architects (Registration) Act, 1931; the council now purports to suppress those interests.

---

[1] [1892] 3 Ch. 242.

The appellant's activities, of which complaint has been made, cannot be regarded as disgraceful from any point of view, and least of all to him in his capacity as an architect: *Allinson* v. *General Council of Medical Education and Registration* [2] and *Reg.* v. *Architects' Registration Tribunal, Ex parte Jagger.*[3] Conduct which is permissible one day cannot be regarded as disgraceful the next. The court has a complete discretion to review the decision of the council and to make any order which should have been made.

B. J. M. MacKenna Q.C. and *J. C. Leonard* for the respondent. The court must consider the function of a code of professional conduct: *General Medical Council* v. *Spackman.*[4] Such a code does not purport to have the force of law; it merely reflects the standard of conduct which the profession sets for itself. A breach of that standard may expose the breaker to an allegation that he has been guilty of disgraceful conduct, not on the grounds of moral obliquity, but in his professional capacity: *Rex* v. *General Council of Medical Education and Registration.*[5] It has never been suggested that the appellant was punished for a breach of the code of professional conduct.

The appellant knew throughout the years which had been allowed to him as a period of grace that his activities did not conform with the standard which the profession had set for itself; and yet during that period he deliberately flouted that standard. Now that that period of grace has come to an end, and since he continues to flout that standard, he is guilty of conduct disgraceful to him in his capacity as an architect. There was sufficient evidence to justify the decision to which the council came, and, in the circumstances, the court should not interfere with it.

Cur. adv. vult.

May 24. The following judgments were read.

Lord Goddard C.J. On December 14, 1956, the respondents to this appeal determined that the name of the appellant should be removed from the register of architects kept under the provisions of the Architects (Registration) Acts, 1931 to 1938, and that he be disqualified from registration for a period of two years from December 14, 1956, and was not to be entitled to admission to the register thereafter unless in the meantime he has passed one of the recognized examinations for registration. This determination followed on an inquiry held by the discipline committee of the council established under the Act of 1931, which reported that the appellant had been guilty of conduct disgraceful to him in his capacity as an architect. Considering that the appellant is a man of over 60 years of age, and has been in practice without any sort of complaint as to his professional competence for something like 35 years, it is indeed remarkable that the council should determine that the suspension imposed should only be determined if he sat for and passed an examination, especially as the reason for his suspension had nothing to do with his professional competency. I can only suppose that the reason for imposing such a condition was that the council in fact meant to suspend him for life, for it is inconceivable that at his age the appellant would be willing to submit himself for examination. His right to be registered originally did not, as will be seen, depend upon his qualifying by examination, and though it is not necessary to determine it in this case, I have the greatest doubt whether such a condition for reinstatement could be lawfully imposed.

---

[2] [1894] 1 Q.B. 750; 10 T.L.R. 304.

[3] (1945) 61 T.L.R. 445; [1945] 2 All E.R. 131.

[4] [1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 337.

[5] [1930] 1 K.B. 562; 46 T.L.R. 197.

The question raised by this appeal is one of importance, though for reasons which will appear from this judgment, it will not affect more than a dwindling number of the profession. As our decision is not open to appeal I propose to deal with the matter as fully as possible and to start by examining the relevant statutes.

By the Act of 1931 a register of architects and an Architects' Registration Council were established. By section 6 the qualifications for registration are laid down, one of which was that the application for registration was made within two years of the Act coming into force, and that the applicant then was or had been practising as an architect in the United Kingdom. It was under this provision that the appellant was registered in 1934. He had entered into articles in 1919 and had been in practice either in partnership or alone since 1922. He practised and described himself as an architect, chartered surveyor, land and estate agent and valuer and, in fact, was a fellow of the Surveyors' Institute, which is a chartered body. The Act of 1931 did not forbid a person to describe himself as an architect or to practise as such although he might not be registered. What the Act did was to prohibit the use of the term "registered architect" by any person who was not on the register. Section 7 of the Act gives power to the council to remove the name of a person convicted of a criminal offence, and anyone found guilty of conduct disgraceful to him in his capacity as an architect by the statutory disciplinary committee after inquiry held by them. The section contains provisions as to the appointment and constitution of the committee, and as to its procedure. In 1938 a short Act was passed, the main object of which was to prohibit under heavy penalties anyone from describing himself as an architect unless he was registered, and from that Act coming into force the title or description "registered architect" disappeared. It was the use of the word "architect" that was prohibited.

Before this Act was passed, which no doubt added considerably to the dignity of the profession, the council had issued a code of professional conduct for registered architects and, among other things laid down, was that the business of auctioneering or house agency must not form part of the registered architect's practice. There was, of course, no objection to the council laying down rules for the guidance of their members' professional conduct, but the code had no statutory force of itself. The position in 1936 was that persons who had been in practice before 1931 had a right to be registered whether or not they were also carrying on business as house agents. No doubt the council before registering persons, whose only qualification was actual practice, would be entitled to be satisfied that the applicant had been genuinely engaged in architectural practice, and that he was not in reality merely a surveyor or house agent who called himself an architect. But if he had genuinely practised he was entitled to registration, and Parliament did not limit his right or make it a condition that he had not or would not engage in any other business. The legislature has conferred powers on several professional bodies to control admission to the profession, and given them disciplinary authority over their members, but at the same time preserving the right of persons who had been practising before this privilege was conferred to carry on as before, though they might not possess the particular qualifications by examination or otherwise that would be required from new entrants. Gradually these practitioners would disappear by retirement or death, but I cannot agree that the council or governing body of a particular profession can necessarily impose on those persons all that they could on new entrants.

In 1934 the appellant was carrying on these other activities and there was nothing in the Act to disentitle him to registration on that account, and once he was on the register he could describe himself as a registered architect. Now it is clear that in 1936 the council were hoping to get additional powers and were promoting a Bill, which became the Act of 1938, with this object. They were anxious to prevent, if they could, the carrying on of a business of surveyor or estate agent with that of an architect. Naturally, this was a matter of concern to surveyors, some of whom, like the appellant, did practise both as surveyors and architects. In January, 1937, we find that the president of the respondent council wrote to the Institution of Chartered Surveyors with reference to the proposed legislation saying: "There is "nothing in the Bill to interfere in any way with the activities of "any person save that he may not call himself 'architect' "unless he is qualified to do so by registration." The conduct which the council have found disgraceful is that the appellant has refused to comply with the standard which the profession as a whole approves that the business of a house agent ought not to be carried on by an architect, and so flouts the standard which the profession as a whole has set for itself and which has been set out in the code of conduct. So, disgraceful conduct in his capacity as an architect is attributed to the appellant because he is doing and asserting his right to do the very thing which the president of the council informed this other professional body, of which the appellant is a fellow, the proposed Act would not interfere with. He was writing to the body which obviously was interested in seeing that their members' business or practice would not in the future be restricted or impeded. It seems to me that the appellant is entitled to say: "You tell the professional "Institute, of which I am a fellow, in 1937, when you are seeking "further powers, that I and others like me can continue as "before, and then allege that it is disgraceful if we do." Moreover, the council seem to have recognized that, in spite of the provisions of the code, they ought to allow the members who had previously carried on their other avocations to continue to do so at least for a time, but they fixed a date beyond which it was said it would be regarded as misconduct if they continued to do so, and it is because the appellant continued after that date and asserted his right to do so that he has been adjudged guilty of disgraceful conduct.

The first and, to my mind, perhaps the most important question in the case is to determine the powers of this court on an appeal. Section 9 of the Act of 1931 is the section which gives the right of appeal and is in these terms: "Any person "aggrieved by the removal of his name from the register, or by

1957

HUGHES v. ARCHITECTS' REGISTRATION COUNCIL OF THE UNITED KINGDOM.

Lord Goddard C.J.

"a determination of the council that he be disqualified for "registration during any period, may, within three months from "the date on which notice of the removal or determination was "served on him, appeal to the High Court or Court of Session "against the removal or determination, and on any such appeal "the court may give such directions in the matter as they think "proper, and the order of the court shall be final."

It has been held by this court that a section in these terms confers a right of appeal as wide as one from a judge to the Court of Appeal: see *Allender* v. *Royal College of Veterinary Surgeons*.[1] While an appellate court will always attach great importance to the finding of a lower court, especially on findings of fact, if, in their opinion, the decision below is wrong they must give effect to their opinion and reverse it. It is contended that this court cannot on the authorities reverse the finding that the conduct of the appellant was disgraceful as an architect, though not in the popular sense of that word, because what is or is not proper professional conduct is entirely a matter for the council. On this point reliance is placed on *Allinson* v. *General Council of Medical Education and Registration*,[2] and on *Rex* v. *General Council of Medical Education and Registration*.[3] The essential and vital difference between those cases and the present, in my opinion, is that no appeal is given from a decision of the General Medical Council and an appeal is given from a decision of the Architects' Registration Council. This is not a matter of certiorari, it is an appeal. It is not a case in which the court has to see only if the council had jurisdiction to make the order they did, and whether they had evidence on which they could act; in this case, as in the case of appeals from the decision of several other professional domestic tribunals, all of which are set out in R.S.C., Ord. 59, r. 38, this court must decide whether the decision of the tribunal was right and can be upheld. The only ground on which a person can be removed from the register is that he has been guilty of conduct disgraceful in his capacity of an architect. He is given a right of appeal against his removal. If, therefore, the court cannot consider whether he has been guilty of conduct which justified his removal the right of appeal would be purely illusory. The appeal given by the section is against the finding, not against the degree of punishment, for the only sentence that can be imposed is removal from the register.

---

[1] [1951] W.N. 527; [1951] 2 T.L.R. 872; [1951] 2 All E.R. 859.

[2] [1894] 1 Q.B. 750; 10 T.L.R. 304.

[3] [1930] 1 K.B. 562; 46 T.L.R. 197.

Now here we have the case of a man who was given by the statute a right to be registered, and it is not contended that in 1932 the council could have refused him registration because he was then practising also as a house agent. In my opinion, Mr. Gardiner was right in his submission that if the action of the council can be upheld it means that they could have registered him one day, notwithstanding that he practised also as a house agent, and on the next removed him on that ground, which would be plainly absurd. Then it is surely material that the appellant openly practised as before for more than 20 years after registration. How can it reasonably be said that it was disgraceful for him to continue to do so after a particular date which the council chose to appoint? Mr. MacKenna submitted that while it might not be disgraceful for an architect to practise as a house agent, it became disgraceful to do so once the general opinion of the profession decided against such practice. That seems to me only to state the proposition in a different way. If, for reasons applicable to the individual concerned, his conduct could not fairly be considered disgraceful as an architect, in my opinion a disapproval of that conduct in other members of the profession cannot make his conduct disgraceful. I do not doubt for one moment the right of the profession to lay down rules of professional conduct and to enforce them, but it must be remembered that we are here dealing with what may be described as a transitional state of affairs. They were obliged to register persons whose only qualification was that they were actually practising as architects, and, though I am not of course saying this applied to the appellant, it might well be that their professional competence was of the slightest. The number admitted under this provision will in time disappear, and probably by this time is very much reduced. It was, in my opinion, wrong to apply the same considerations and standards to them in all respects as to new entrants. For a time the profession would include qualified and unqualified members, and by unqualified I mean those who were admitted without examination or without the degree which was accepted in lieu of examination, and then only if they had applied within two years of the Act coming into force. I do not wish it to be thought that I am saying that architects admitted to the register, as was the appellant, are not bound by any rules of professional conduct, nor has he so contended. There are rules of conduct which all professional men must observe.

Refraining from advertising would, I think, clearly be one. But, considering the ground on which Parliament gave the appellant the right to be registered, in my opinion he cannot be held to be guilty of conduct that by any standard can be said to be disgraceful because he continued to practise in exactly the same way after registration as he had done before, and that practice did not disqualify him for registration.

I would allow the appeal, and would quash the order removing the appellant's name from the register, and order it to be restored.

HILBERY J. In the course of the argument in this case I inclined to the view that in this appeal we were limited in the way in which the court is limited in the case of an appeal to the court by a doctor who has been struck off the register of medical practitioners by the General Medical Council acting under the powers given to them by the Medical Act, 1888.

In *Allinson* v. *General Council of Medical Education and Registration*[4] Lopes L.J. said[5]: "Then I come to the question "of 'infamous conduct . . .' and, in my opinion, if there was "any evidence on which the council could reasonably have come "to the conclusion to which they did come, their decision is "final. If, on the other hand, there was no evidence upon "which they could reasonably arrive at that conclusion, then "their decision can be reviewed by this court."

If, therefore, on this appeal we were limited to the considerations stated by Lopes L.J., I should have found it very difficult to say that there was no evidence on which the committee in this case could reasonably have come to the conclusion to which they did come.

I am now, however, completely satisfied that the position of the court under this Act, exercising the appellate jurisdiction given to it by the Act, is not limited as it is in the cases under the Medical Act, 1888, where there is no appeal to this court.

My Lord's judgment has satisfied me that our situation is entirely different and that before us this case is heard by us sitting as a Court of Appeal with all the powers of a Court of Appeal. Being persuaded that this is the right view I concur with the judgment of my Lord for the reasons which are given in his judgment.

DEVLIN J. Section 7 of the Architects (Registration) Act, 1931, gives the council power to strike the name of an architect from the register if he has been "guilty of conduct disgraceful to "him in his capacity as an architect." I cannot accept the argument that the term "disgraceful" is in any sense a term of art. In accordance with the usual rule it is to be given its natural and popular meaning. But it is qualified by the phrase "in his "capacity as an architect." The effect of that qualification is twofold. First, the conduct must not only be what would ordinarily be considered disgraceful, but it must also be a disgrace which affects him professionally: to that extent the qualification diminishes the term. Secondly, conduct which is not disgraceful for an ordinary man may be disgraceful for a professional man: to that extent the qualification amplifies the term. But the amplification does not require that "disgraceful" is to be given any technical meaning: it requires only that the ordinary meaning of the word should be applied in relation to the special obligations and duties of a professional man. It must not be forgotten that, if the finding of the committee stands, anyone may hereafter say of the appellant with impunity that he was struck off the register for disgraceful conduct and may add that that means what it says.

---

[4] [1894] 1 Q.B. 750.

[5] Ibid. 763.

What, then, is the disgraceful conduct with which the appellant is charged? It is not simply that he combined the activities of architect and house agent. There is nothing inherently disgraceful in that. The council make no such allegation and could not without exposing themselves to the charge that they had for the last 20 years at least condoned disgraceful behaviour. What they say about it is that it is a "wrong practice" to which the profession as a whole is opposed, as witnessed by its condemnation in the code. I accept that this condemnation is reasonable and that the code, while it has no statutory or contractual force, does, on this point at least, express the best opinion in the profession. But the pursuit of a wrong practice is not of itself disgraceful; and the council's allegation does not rest solely upon that.

I do not say that the pursuit of an undesirable practice can never be disgraceful. Every profession has practices which it bars. Among the commonest of these are advertising, poaching and undercutting. These activities which are considered in the business world to be laudable examples of enterprise—so much so that their restraint is prima facie contrary to public policy—have always been considered offensive professionally. If a man joins a profession in which the use of trade weapons is barred, and then proceeds to employ them, he is taking an unfair

1957

HUGHES
v.
ARCHITECTS'
REGISTRATION
COUNCIL OF
THE UNITED
KINGDOM.

Devlin J.

advantage over his fellows. They restrain themselves, believing, rightly or wrongly, that such restraint is essential to the good health of the profession as a whole; he gets the benefit of their restraint and fills his purse at their expense. He is defaulting on the obligation, by which explicitly or impliedly he undertook to be bound when they made him of their company. Such conduct could be thought disgraceful not merely by those of the profession but by outsiders who were not themselves bound by the same standards. This is in fact the basis of the finding against the appellant, which is expressed in the following terms: "The respondent was deliberately and knowingly flouting, "because of his own private interests, the standard which the "profession as a whole has set itself and which has been set out "in the code of conduct."

In reaching their conclusion, expressed in these terms, that the appellant's conduct is disgraceful, the committee have overlooked the absence from it of an essential element. It is not of itself disgraceful to disagree with a majority view and to act accordingly. It is only if a man has bound himself in honour to accept that view and to act according to the code that a deliberate breach of the code for his own profit can be called disgraceful. The appellant has never bound himself in that way. He was in practice as an architect and estate agent long before the code was first formulated or the Act of 1931 passed. His case differs, not merely in degree, but toto coelo from that of the new entrant who is admitted upon terms, written or unwritten.

I sympathize with the efforts of the council to eradicate undesirable practices from the profession. In a time of transition and when standards are being changed, it is hoped, for the better, it must always be difficult to decide how fast it is fair and reasonable to go. Some might say that the older members, who had established themselves in accordance with the standards then current, ought not to be asked to change their ways at cost to themselves, even though their lagging behind put off the day of complete purification. Others might say that some sacrifice from the older members could fairly be demanded and that the seven years' grace given to them was generous enough. I am bound to say that, having regard to the assurances given in 1937, I should have thought the former course to be the fairer. It is submitted that the one adopted by the council is reasonable. Perhaps it is: and then, if the council had power derived from statute or contract to decide the point, that would settle it.

But it has not. I do not understand how it can be said that anyone who takes a different view on such a point and acts accordingly is behaving disgracefully.

In truth and in fact, and however plausibly the argument may seek to disguise it, what the council is trying to do is to enforce a code which has no legislative sanction and to coerce a minority, which is free and unpledged, into submission to an arbitrary decision. I do not mean that it is arbitrary in the sense of unreasonable; it is arbitrary because the force that lies behind it is simply that it is an edict of the council—nothing more. It is idle to say that the appellant's offence is that he is flouting the common opinion of the profession. That opinion has existed, so the council say, at least since 1936. The appellant has been flouting it for the last 20 years and for the last seven of them—the period of grace—with the express approval of the council. His offence is, not that he is flouting it but that he is continuing to flout it far longer than the council consider it reasonable that it should be flouted. They might have said eight years, in which case they would have postponed the appellant's disgrace by a year; but they picked on seven. So the appellant had until December 31, 1955, to conform. If in December, 1955, anyone had suggested that the appellant was behaving disgracefully, he could have recovered heavy damages for defamation; but, it is said, when the clock struck midnight he began to sin. So high a degree of punctuality brings the point near to absurdity. Disgrace is not something that gets brought in with the New Year.

It is said that this is an important case. So it is. But there is something more important than the standing of a profession about which the council is naturally and properly concerned. There is the right of every man to earn his living in whatever way he chooses unless by the law or by his own voluntary submission his way is taken from him; and in the exercise of that right he must not be punished by a professional majority under the pretext—for that is all it is, though I am sure it was not consciously adopted as such—that nonconformity is of itself disgraceful.

Appeal allowed.

Solicitors: *Beale & Co.; Field, Roscoe & Co.*

1957
July 8, 9.

Lord Goddard C.J.,
Slade and
Gorman JJ.

NORRIS *v.* EDMONTON CORPORATION.

Town and Country Planning—Enforcement notice—Form—Compliance with statutory requirements—No appeal against notice—Failure to comply with requirements of notice — Subsequent prosecution — Whether evidence admissible to prove development had not taken place — Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 24.

The appellant, who was the occupier of land used for the purposes of car breaking, car repairs and the sale of cars, was served by the respondents with an enforcement notice pursuant to sections 23 and 24 of the Town and Country Planning Act, 1947,[1] alleging that the land had been developed by such user, and requiring the appellant to discontinue that use and to restore the land to its previous condition as a domestic yard to a dwelling-house. The appellant did not appeal against the notice under section 23 (4) of the Act, but continued the existing use, and the respondents preferred an information against him alleging default in complying with the notice, contrary to sections 23 and 24 of the Act. At the hearing of the summons the justices refused to admit evidence of the user of the yard prior to the appellant's occupation which the appellant wished to call to prove that his use of the land

[Reported by G. D. Black, Esq., Barrister-at-Law.]

---

[1] Town and Country Planning Act, 1947, s. 23 (4): "If any person on "whom an enforcement notice is "served under this section is "aggrieved by the notice, he may, "[within 28 days] appeal against "the notice to a court of sum-"mary jurisdiction . . . and on "any such appeal the court—(*a*) if "satisfied that permission was "granted under this Part of this Act "for the development to which the "notice relates, or that no such per-"mission was required in respect "thereof, or, as the case may be, "that the conditions subject to which "such permission was granted have "been complied with, shall quash "the notice to which the appeal "relates; . . ."

S. 24 (1): "If within the period "specified in an enforcement notice, "or within such extended period as "the local planning authority may "allow, any steps required by the "notice to be taken (other than the "discontinuance of any use of land) "have not been taken, the local plan-"ning authority may enter on the "land and take those steps, and may "recover as a simple contract debt in "any court of competent jurisdiction "from the person who is then the "owner of the land any expenses "reasonably incurred by them in that "behalf; and if that person, having "been entitled to appeal to the court "[under s. 23] failed to make such "appeal, he shall not be entitled in "proceedings under this subsection "to dispute the validity of the action "taken by the local planning autho-"rity upon any ground which could "have been raised by such an "appeal."

S. 24 (3): "Where, by virtue of "an enforcement notice, any use of "land is required to be discontinued, ". . . then if any person, without "the grant of permission in that "behalf under this Part of this Act, "uses the land or causes or permits "the land to be used, . . . in con-"travention of the notice, he shall be "guilty of an offence. . . ."

did not constitute development within the meaning of the Act, and they found him guilty of the charge alleged:—

Held, that the question whether there had been development or not was a matter which could have been raised on an appeal under section 23 (4), and it could not thereafter be raised in proceedings before the justices on a prosecution under section 24 (3).

East Riding County Council v. *Park Estate (Bridlington) Ltd.* [1957] A.C. 223; [1956] 2 All E.R. 669 and *Perrins* v. *Perrins* [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075 applied.

Keats v. *London County Council* [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303 questioned.

CASE STATED by Middlesex justices.

On January 18, 1956, the respondents, as local planning authority, served an enforcement notice dated January 16, 1956, on the appellant, Dennis James Norris, under the Town and Country Planning Act, 1947, in respect of his use of a yard at the rear of 160, Town Road, Edmonton. It was accepted by the appellant that on January 16, 1956, and on all subsequent material dates, he was the occupier of the yard and that he used it for car breaking, car repairs and the sale of cars. The notice required the appellant to discontinue that use, which it was alleged constituted development, and to restore the land to its previous condition as a domestic yard to a dwelling-house. The appellant did not appeal against the enforcement notice to the justices under section 23 (4) of the Act and neither discontinued the use of the yard nor restored the land to its condition before the development took place.

On December 4, 1956, an information was preferred by the respondents against the appellant pursuant to section 24 (3) of the Town and Country Planning Act, 1947, that he on October 17, 1956, at the land situate at and forming the rear part of 160, Town Road, Edmonton, in the county of Middlesex, did unlawfully make default in complying with the requirements of an enforcement notice dated January 16, 1956, served by the Edmonton Borough Council, requiring him within the time specified therein to discontinue the use of the land for car breaking, car repairs and sale of cars, and to restore the land to its condition before such development took place as a domestic yard to a dwelling-house, contrary to sections 23 and 24 of the Town and Country Planning Act, 1947.

At the hearing of the information it was contended by the appellant that he was entitled to call evidence of the user of the yard prior to the date when he became occupier in order to prove that his use of the land did not constitute development within the meaning of the Act of 1947, namely, that it did not constitute a material change of use within the meaning of that expression in section 12 of the Act. It was contended by the respondents that the appellant was not entitled to call the evidence, because it was not open to him to raise in proceedings under section 24 (3) of the Act matters which he could have raised in an appeal under section 23 (4).

The justices were of the opinion that the matters could not be raised and accordingly refused to admit the appellant's evidence as to user of the yard prior to the date of the enforcement notice. They found him guilty of the offence charged and fined him £5, and ordered him to pay 5 guineas costs to the respondents. The question stated for the opinion of the High Court was whether that decision was right in point of law.

D. G. Widdicombe for the appellant. The question whether or not there had been any development could not have been raised on an appeal under section 23 (4) of the Act. Throughout section 23 development is referred to as a necessary pre-condition of an enforcement notice. *Keats* v. *London County Council* [2] is a correct decision on the wording of the Act. If the appellant had attempted to raise the question on an appeal under section 23 (4), the local authority, relying on *Keats*' case,[2] could have successfully opposed it. *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.*[3] concerned pre-Act development, and is distinguishable from the present case, and is not inconsistent with it. On the plain wording of the section the issue of development cannot be raised under section 23 (4).

[Slade J. That is not what Lord Evershed said in the *East Riding* case.[4]]

Lord Evershed's remarks are limited to the two types of case mentioned by him after the words "in truth," and they both presuppose some development. The justices should have admitted the evidence.

D. J. Turner-Samuels for the respondents. On an appeal against an enforcement order under section 23 (4) the necessity for permission can be attacked on three grounds: (i) that the change of user alleged is such that permission is not required by virtue of the proviso to section 12 (2); (ii) that no change of user has taken place; (iii) that the change of user occurred at a time when permission under the Act was not required. It is conceded that the question of whether a notice is valid or not on the face of it cannot be raised under section 23 (4). These propositions follow from the decisions in *Perrins* v. *Perrins*,[5] *Mead* v. *Chelmsford Rural District Council*[6] and *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[7]

---

[2] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

[3] [1957] A.C. 223; [1956] 2 All E.R. 669.

[4] [1957] A.C. 223, 252.

[SLADE J. I cannot reconcile *Keats'* case[8] with the *East Riding* case.[9]]

[LORD GODDARD C.J. How does this present case differ from the *East Riding* case?[9]]

Not at all.

[LORD GODDARD C.J. It is difficult to see how those two cases can be reconciled, or how *Keats'* case[10] can stand in view of the later decision of the House of Lords.]

Keats' case[10] was cited in argument in the *East Riding* case,[11] but was not referred to in the speeches. The effect of the *East Riding* case[11] is that the House of Lords have decided that justices have jurisdiction to inquire into the facts on an appeal under section 23 (4) in order to see whether development has taken place. *Perrins* v. *Perrins*[12] is authority for the proposition that matters which could have been raised under section 23 (4) cannot be raised under section 24 (3). [Reference was also made to *Francis* v. *Yiewsley and West Drayton Urban District Council.*[13]]

LORD GODDARD C.J. This is a case stated by justices for the county of Middlesex before whom the present appellant was summoned for making "default in complying with the requirements of an enforcement notice dated January 16, 1956, served by the Edmonton Borough Council requiring him within the time specified therein to discontinue the use of the said land for car breaking, car repairs and sale of cars, and to restore the land to its condition before such development took place as a domestic yard to a dwelling-house, contrary to sections 23 and 24 of the Town and Country Planning Act, 1947."

The case is one of some difficulty and complexity and one could wish that the appropriate Ministry would take notice of the

---

[5] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[6] [1953] 1 Q.B. 32.

[7] [1957] A.C. 223.

[8] [1954] 1 W.L.R. 1357.

[9] [1957] A.C. 223.

[10] [1954] 1 W.L.R. 1357.

[11] [1957] A.C. 223.

[12] [1951] 2 K.B. 414.

[13] Ante 136; [1957] 1 All E.R. 825.

1957

NORRIS
v.
EDMONTON
CORPORATION.

Lord Goddard
C.J.

difficulties which have arisen in the application of this somewhat obscure Act which Viscount Simonds, in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*,[1] described as raising a very difficult point, and on which there are authorities which it is not easy to reconcile one with another.

The enforcement notice dated January 16, 1956, provides: "Whereas you are the occupier of land situate at and forming "the rear part of 160, Town Road, Edmonton, N.9, and whereas "on or about October, 1955, the land above described was "developed by the use thereof for car breaking, car repairs and "sale of cars, and whereas such development before-mentioned "was carried out without the grant of planning permission "required under Part III of the Town and Country Planning "Act, 1947. Now therefore the Mayor Aldermen and Burgesses "of the Borough of Edmonton acting by the Council of the said "Borough on behalf of the County Council of the Administrative "County of Middlesex as local planning authority in exercise of "the powers contained in sections 23 and 24 of the said Act of "1947 hereby give you notice to discontinue the use of the said "land for car breaking, car repairs and sale of cars and to restore "the land to its condition before such development took place "as a domestic yard to a dwelling-house within 28 days of the "date on which this notice takes effect. This notice shall, "subject to the provisions of section 23 of the said Act, take "effect on the expiration of 28 days after the service thereof "upon you." That notice calls in perfectly clear terms for the discontinuance of the use of this land to take place within 28 days of January 16, 1956.

The appellant did not appeal against the notice. It has been contended here that he could not appeal and we shall have to see whether that is so. When he was summoned for not complying with the notice he contended that he was "entitled "to call evidence of the user of the yard prior to the date when "he became occupier in order to prove that his said use of the "land did not constitute development within the meaning of "the Town and Country Planning Act, 1947, namely, that it "did not constitute a material change of use within the meaning "of that expression in section 12 of the said Act of 1947." The justices held that he was not entitled to call that evidence because they held that under the Act, if he desired to raise that point, he should have appealed to the justices against the enforcement notice by separate proceedings under section 23 (4), and that

[1] [1957] A.C. 223, 230; [1956] 2 All E.R. 669.

as he did not the notice was effective and could not be challenged on that ground.

No one suggested that the notice was defective in form or that it was directed to the wrong person or anything of that sort. No suggestion was made that the court could look upon the notice as a nullity in the sense that it was bad on its face in that it did not comply with some provision of the Act. Of course, if what purports to be a notice, but which is not a notice the Act requires, is served upon a person he can ignore it because it is not a notice which complies with the conditions the Act lays down. The recipient would be entitled to treat it as a nullity, but no one takes that point here. The point desired to be taken was that there was no development, and the appellant desires to say that there was no development and that therefore he cannot be called upon to do that which the notice requires him to do.

[His Lordship read sections 23 (4) and 24 (1) and (3) of the Act and continued:] Two points are raised in this case. Mr. Widdicombe, who argued the case with great care and has called our attention to all the necessary cases, submitted that as he wanted to raise the question that there has been no development because the appellant was only using the land in the same way that it had been used by his predecessor, that was a point which could not be dealt with by the justices by way of appeal. For that purpose he relied on *Keats* v. *London County Council*,[2] in which this court, in a judgment delivered by Parker J. and to which I was a party, decided that on an appeal to a court of summary jurisdiction under section 23 the court of summary jurisdiction must assume that the development has taken place. That case seems to me to be inconsistent with the later case of *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*,[3] in which it seems to me the House of Lords have decided that any objection, other than an objection on the ground that the notice is a nullity as not complying with the provisions of the Act, that can be taken to the notice is one which the justices have power to entertain.

The words of section 23 (4) are " . . . the court (*a*) if satisfied " that permission was granted under this Part of this Act for " the development to which the notice relates, or that no such " permission was required in respect thereof . . . shall quash the " notice." Therefore it appears to me that the House of Lords have decided that if a person is objecting that he did not need planning permission for whatever reason, his remedy is to appeal to the justices in petty session. Lord Evershed said[4]: "The "words in section 23 (4), 'no such permission was required in "'respect thereof,' are clearly capable of application to any case "in which permission was not in truth required under the 1947 "Act, whether because the development was of a kind which by "the terms of the Act called for no permission or because the "development, by reason of the date when it was carried out, "was outside the scope of the Act altogether."

---

[2] [1954] 1 W.L.R. 1357, 1360; [1954] 3 All E.R. 303.

[3] [1957] A.C. 223.

I think I am doing the appellant no injustice if I say that what he desired to contend was that the development was of a kind which on the terms of the Act called for no permission because by reason of the date when it was carried out it was outside the scope of the Act altogether. But whether he desired to say that it was not development at all or that it was not a development to which the Act applied, it seems to me that the House of Lords has said that that is a matter which the justices can deal with on an appeal. The leading judgment in the case was that of Lord Simonds,[5] and I think Lord Simonds, taking his judgment altogether, was clearly deciding in exactly the same way that Lord Evershed decided.

The next point that arises is: can this point be raised afterwards when the man is prosecuted for not complying with the notice, or is the prevention which is put upon his raising the point only applicable if he is sued for the expenses of the local authority in carrying out the removal or remedying the development which is said to have taken place? That point seems to me to have been decided by this court in terms in *Perrins* v. *Perrins*,[6] and which, so far as I know, has not been subject to any criticism in any higher court; it may be simply because the exact point has not been raised in any higher court. It is binding upon us, and that case decided that if there was a matter which could be raised by way of appeal and had not been raised by appeal, it could not afterwards be raised as a defence when a prosecution was brought for disregarding the notice. The way I put it in delivering the leading judgment was[7]: "That seems to me to "be a provision expressly included in order to limit the defences "which can be raised. It leaves it open to the owner or occupier "to take certain other objections, for instance, that the work "done by the local authority was unnecessary, in the sense that "they have done more work than necessary or done it at an

---

[4] [1957] A.C. 223, 252.

[5] Ibid. 230.

[6] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[7] [1951] 2 K.B. 414, 418.

"unreasonable cost"—that is, if they are suing for the cost—"or anything of that sort; but it prevents the owner or occupier, "or whoever is sued, from taking objection to the notice. It "would be very odd that he should not be entitled to take objection to the notice when summoned for the cost of doing the "work while still being entitled to take objection when he is "prosecuted under section 24 (3) for failing to observe its terms. "The offence in question is created by section 24 (3). The "offence is doing something in contravention of the notice, the "notice which the previous section says shall be effective at the "end of 28 days unless there is an appeal. Therefore, it is not "for the justices, when a person is prosecuted for the offence "of contravening an enforcement notice which has not been "appealed, to go into the question whether the notice was a good "or a bad one: it has become effective, and, once it is effective, "it is the duty of the person who has had the opportunity of "appealing against it, and has not appealed, to abide by it." That decides that if one finds there was a matter which could be taken to appeal under section 23, a person cannot raise that point as a defence if he is prosecuted for disobeying the notice.

With regard to *Keats* v. *London County Council*,[8] my view is that it is irreconcilable with *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*,[9] and I think in effect, although their Lordships did not refer to *Keats'* case in their speeches, it must be taken to be overruled by it. I cannot reconcile the reasoning of this court in *Keats'* case with the reasoning of the House of Lords in the *East Riding* case.[9] With regard to the second point that is raised here, *Perrins* v. *Perrins* [10] is binding on us. Therefore, we must give effect to it and hold that the justices were right.

I think as this is a criminal cause or matter, as the appellant is being summoned on an information and dealt with for a default, it is a great misfortune that this case cannot go to the House of Lords. There are still obscure questions under this section, and now that I have called attention prominently to *Keats'* case,[11] it is very desirable that an opportunity should be given to their Lordships to consider that case. Unfortunately, the law does not allow an appeal from this court in a criminal cause or matter, but I hope that possibly some opportunity may be taken to try to clear up by legislation the obscure position which arises under this Act. It is a curious provision about this appeal to justices against the notice, but no doubt there is a very good reason for it; as pointed out by Lord Evershed in his judgment,[12] it is very desirable that these questions should be dealt with promptly so that any uncertainty as to the rights of people with regard to their property may not exist. As it is, in my opinion the justices came to a right decision, and therefore this appeal must be dismissed.

---

[8] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

[9] [1957] A.C. 228.

[10] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[11] [1954] 1 W.L.R. 1357.

Slade J. I agree, and I desire to add only this: The justices refused to hear evidence tendered on behalf of the appellant on the ground that it related to a point which could have been raised in an appeal. I agree that it could have been raised in an appeal under section 23 (4) of the Town and Country Planning Act, 1947. The question then arises whether it could not have also been raised before the justices in proceedings for contravention of an enforcement notice. I respectfully agree with what my Lord has said, namely, that this court is bound by its decision in *Perrins* v. *Perrins*.[13] Had the matter been res integra I should have required to hear argument on the true construction of section 24 (1) and (3). Section 24 (1) specifically enacts that where the local planning authority themselves proceed to carry out the work required to be done by the notice, they can recover the cost of so doing from the owner as a civil debt, and provides: "and if that person, having been entitled to appeal to the court "under the last foregoing section, failed to make such an appeal, "he shall not be entitled in proceedings *under this subsection* to "dispute the validity of the action taken by the local planning "authority upon any ground which could have been raised by "such an appeal." "This subsection" is subsection (1).

Subsection (3) of section 24 deals with the offence which is the subject of this appeal, and that subsection contains no such embargo as appears in subsection (1). That point, however, is not open to this court in view of *Perrins* v. *Perrins*,[13] and I agree on both grounds with the opinion expressed by my Lord and that this appeal should be dismissed

Gorman J. I agree.

Appeal dismissed.

Solicitors: *C. Grobel, Son & Co.; Town Clerk, Edmonton.*

---

[12] [1957] A.C. 223, 252.

[13] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY *v.* SKEGNESS URBAN DISTRICT COUNCIL.

C. A.

1957
July 8, 9, 10, 30.

Hodson, Parker and Ormerod L.JJ.

Rates and Rating—"Social welfare"—Friendly society—Convalescent home—Society providing benefits and assurance for members—Benefits provided on actuarial basis—Claim by society for rating relief under section 8 *of the Rating and Valuation (Miscellaneous Provisions) Act,* 1955—*No element of advancement of good of community—Objects of the society not "concerned with the advance-"ment . . . of social welfare"—Society not entitled to rating relief in respect of convalescent home—Rating and Valuation (Miscellaneous Provisions) Act,* 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.
Friendly Society.

A society registered under the Friendly Societies Acts claimed to be entitled to the benefit of the rating relief provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in respect of a convalescent home and premises occupied by the society on the ground that it was a hereditament "occupied for the purposes of an organization . . . which is not "established or conducted for profit and whose main objects are "charitable or otherwise concerned with the advancement of . . . "social welfare" within the meaning of section 8 (1) (*a*). According to its rules the main objects of the society were "to provide "by voluntary contributions and deposits of the members," inter alia, relief during sickness, medical benefit, convalescent home benefit, and insuring money to be paid on the death of a member for members in the deposit and alternative benefit sections, and, for members in the assurance section, whole of life assurance payable at the death of a member, life endowment assurance, endowment assurance (payable to a member at the end of a term of years) and annuities in old age. The income of the society was devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which the members were entitled in accordance with the rules, and the payment of the expenses of management. No member received any dividend or share of income other than interest at 2½ per cent. on money standing to the credit of his deposit account and such sickness or other benefits as were provided by the rules. Under the rules governing the admission of members the committee of management, who could require a medical examination, might at their discretion admit persons of either sex as benefit members who satisfied the committee regarding "age, health, character and occupation" and a candidate was required to be "in good health, of sound constitu-"tion, with no hereditary family complaint and shall not be "following an occupation considered by the committee . . . to be "risky or injurious to health." There were also a number of

C. A.
1957

NATIONAL DEPOSIT FRIENDLY SOCIETY TRUSTEES *v.* SKEGNESS URBAN DISTRICT COUNCIL.

rules and tables of premiums relating to assurance. The convalescent home in question was open without charge to members of the society whose subscriptions were not more than four months in arrear.

The Divisional Court, affirming the decision of the Lincoln (Parts of Lindsey) Quarter Sessions, held that (assuming the society was not established or conducted for profit) it was not an organization whose main objects were concerned with the advancement of social welfare within the meaning of section 8 (1) (*a*) and accordingly was not entitled to the relief provided by section 8 (2).

On appeal by the society:—

Held, (1) that although the society had earned profits from which the members benefited that was purely incidental and it could not be said that the society was established or conducted for profit. It carried on no business for the purpose of earning profits.

Reg. v. *Whitmarsh* (1850) 15 Q.B. 600 distinguished.

(2) That the words "or otherwise" in section 8 (1) extended the objects in respect of which relief was given under section 8 (2) to objects which were not charitable in the legal sense; that that provision was an exemption from rates at the expense of the general body of ratepayers and therefore, in the case of any doubt, the words should be given a restricted meaning; that there were grave difficulties in applying the ejusdem generis rule (for which the council contended) in a case where there was only one species available out of which to construct a genus; but that although the payment of certain benefits by the society to its members, in return for contributions paid by them, might advance the well-being of individual members, it was impossible to hold that the main objects of the organization were the advancement of social welfare as an end in itself or for its own sake, and the appeal failed.

Decision of Divisional Court [1957] 1 Q.B. 531; [1957] 1 All E.R. 407 affirmed.

APPEAL from Divisional Court[1] on a case stated by Lincoln (Parts of Lindsey) Quarter Sessions.

By a notice of appeal given under section 4 of the Poor Relief Act, 1743, the appellants, the trustees of the National Deposit Friendly Society, appealed against a rate made on March 20, 1956, and a demand for payment issued thereon by the Skegness Urban District Council, the rating authority for the urban district of Skegness, for the purposes of the Rating and Valuation Act, 1925, in respect of a hereditament, a convalescent home and premises at North Parade, Skegness, occupied by the society, on the ground that in making the demand the rating authority had failed to allow to the society the relief from liability provided by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.[2]

---

[1] [1957] 1 Q.B. 531; [1957] 1 All E.R. 407.

According to the rules of the society effective at the material time attached to and forming part of the case stated by quarter sessions, membership consisted of benefit and honorary members, and the objects of the society were, by rule 2 (1), " to provide " by voluntary contributions and deposits of the members for " (*a*) members in the deposit section (i) relief during sickness or " other infirmity, (ii) medical benefit, (iii) convalescent home " benefit, (iv) insuring money to be paid on the death of a " member; (*b*) members in the alternative benefit section (i) relief " during sickness or other infirmity, (ii) convalescent home " benefit; (*c*) members in the assurance section (i) whole of life " assurance payable at the death of a member, (ii) life endow- " ment assurance . . . (iii) endowment assurance . . . (iv) annuities " in old age, (v) insuring money to be paid to a member on the " death of the member's husband or wife or on the duration for " a specified period of the life of the member's husband or wife " . . . (vi) insuring a sum of money to a member on the death " of any one of his parents . . . " By rule 2 (2): " The society " shall accumulate at interest for the use of any member of the " deposit or the alternative benefit sections any surplus of his " contributions . . . which may remain after providing for the " assurances in respect of which such contributions are paid. " (3) Each member of the deposit section shall pay a proportion " of his sickness, maternity and medical benefit or old age pay " out of his own deposit and, so long as he continues to do so, " his fellow members will provide the rest."

By rule 83. which governed the terms of admission of members: " 1. The committee of management who shall deter- " mine when a medical examination or evidence of age shall be " required may, at their discretion, admit as benefit members of

---

[2] Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8: " (1) This section applies to . . . " (*a*) any hereditament occupied for " the purposes of an organization . . . " which is not established or con- " ducted for profit and whose main " objects are charitable or are other- " wise concerned with the advance- " ment of religion, education or " social welfare . . . (2) for the " purposes of the making and levying " of rates . . . for the year begin- " ning with the date of the coming " into force of the first new valua- " tion list . . . the amount of rates " chargeable in respect of a heredita- " ment to which this section applies " shall . . . be limited as follows " . . . (*a*) for the first year of the " new list, the amount so chargeable " shall not exceed the total amount " of rates (including any special " rates) which were charged in " respect of the hereditament for the " last year before the new list came " into force."

"the society persons of either sex who . . . (*b*) satisfy the committee . . . regarding age, health, character and occupation. "2. (*c*) A candidate shall be in good health, of sound constitution, with no hereditary family complaint and shall not be "following an occupation considered by the committee . . . to "be risky or injurious to health" and upon admission, members were, at the discretion of the committee, placed into one of several classes, according to age, health and occupation. Rule 108 contained a number of provisions and tables of premiums in respect of whole of life, life endowment, and endowment assurance.

The following facts were found by quarter sessions. The appellant society was a friendly society founded in 1868 and first registered under the Friendly Societies Acts on August 27, 1872. The society carried on all the activities of their constitution and their policy in the investment of their accumulated funds was to choose investments which offered the highest return of income consistent with security of capital, no attempt being made to select investments with a view to capital accretion. The income of the society was devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which their members were entitled in accordance with the rules of the society and the payment of expenses. No member received any dividend or share of income other than interest at 2½ per cent. on moneys standing to the credit of his deposit account and such sickness or other benefits as were provided by the rules. The convalescent home at Skegness was open to members of the society whose subscriptions were not more than four months in arrear in accordance with the rules and without charge. So far as the questions were questions of fact, quarter sessions found that the society was not established or conducted for profit and that apart from the welfare of individuals who subscribed, there was absent any element of advancement of the good of the community because the society's benefits were not available to anyone who was not a member.

The amount demanded by the rating authority by way of rates upon the convalescent home and premises in the year beginning April 1, 1956, was £1,983 4s.; the amount of rates (including any special rates) so charged in respect of the premises in the year ending March 31, 1956, was £786 10s.

It was contended by the society that they were an organization not established or conducted for profit, whose main objects were concerned with the advancement of social welfare and that the hereditament in question was one to which section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, applied.

It was contended by the rating authority that the society was not such an organization.

Quarter sessions was of the opinion that the society was an organization which was not established or conducted for profit but that, being concerned only with the provision of benefits for its own members, the society was not concerned with the advancement of social welfare within the meaning of section 8, and accordingly they dismissed the appeal.

On appeal by the society the Divisional Court held that the society was not concerned with the advancement of social welfare and, therefore, not entitled to relief.

The society appealed.

John Pennycuick Q.C. and *J. P. Widgery* for the society. This society is an organization which is not established or conducted for profit and whose main object is concerned with the advancement of social welfare; in other words, it is for the advancement of the welfare of the public within the meaning of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and is therefore entitled to rating relief. It is not contended that it comes within the section as a charity, but as an organization concerned with the advancement of social welfare. On that point the Divisional Court found against the society on the ground that its main object was insurance. It is insurance, but at small premiums, and that is for the advancement of social welfare. Section 8 covers not only organizations whose main objects are charitable, but any organization which is mainly concerned with the advancement of religion, education or social welfare. The inference to be drawn from the words of the section is that Parliament intended to extend the rating relief to organizations whose objects were for public benefit. All that the appellants have to show is that this society is concerned with the advancement of "social welfare." That expression occurs for the first time in this Act, and in cases which have come before them the courts have refrained from construing "social welfare." The preamble to Rose's Act (33 Geo. 3, c. 54), however, describes the activities now known as social welfare. It carries the connotation of the mass of the people—those in the lower income groups. It is the provision of benefits appropriate to the mass

C. A.

1957

NATIONAL DEPOSIT FRIENDLY SOCIETY TRUSTEES *v.* SKEGNESS URBAN DISTRICT COUNCIL.

of the people. The question, therefore, is whether the benefits with which this organization is concerned are appropriate to the mass of the people. That is the broad meaning of the expression "concerned with the advancement of social welfare," and it is submitted that this is such an organization. Any organization which, in return for payments within the range of the mass of the people, pays out benefits to the mass of the people comes within the section. Reliance is placed on the definition of social welfare activity in section 16 of the Miners' Welfare Act, 1952. The purposes listed in Part II of the First Schedule to that Act are the same as the benefits provided by this society.

The fact that the benefits provided are only available to members of the society is immaterial. No eleemosynary link is required between those who provide and those who receive the benefit.

Sir Arthur Comyns Carr Q.C., *C. E. Scholefield* and *J. D. James* for the rating authority. The society is not an organization whose main objects fall within section 8 (1) (*a*) of the Act of 1895. It is clear from its rules that it is conducted on the basis that the subscriptions are more than enough to pay for the benefits provided, and membership is subject to a candidate proving good health and satisfying the committee with regard to certain other matters. It is therefore purely and simply a self-help society and the public can claim no right to be admitted. Such a society is in no sense charitable. Its accounts show that it has accumulated large investments, and it is not conceded that it is not established or conducted for profit. Mutual insurance companies carry on exactly the same business as these friendly societies. It appears to be argued that mutual insurance companies would be excluded from relief under section 8 only because of the large premiums which they charge. It is submitted that Parliament cannot have intended to include these societies. That conclusion can be supported by the history of this legislation and the wording of section 8. There must be a restrictive meaning to the section. Parliament cannot have intended so wide an interpretation as the appellant society seeks to give it. For probably 400 years, down to 1948, every hereditament was to be assessed on its rental value and the number of exemptions was very small. Charities as such got no relief at all by law, but the valuation being in the hands of the local authorities some sympathetic concessions were made, the authority not bothering about the legality. By the Local Government Act, 1948, followed by the Valuation for Rating Act, 1953, big changes were made.

Where the words "or otherwise" are used in a statute the ejusdem generis rule of construction must be applied: see *Monck* v. *Hilton.*[3] To be concerned with "social welfare" within the meaning of section 8 (1) (*a*), therefore, the objects of an organization, although they need not be charitable in the strict legal sense, must be charitable in a broad sense or resemble charitable objects. "Social" implies welfare at large, and objects to qualify as being concerned with social welfare must benefit a wider circle of the community than the subscribers of a society. The insurance business carried on by the society shows that its main objects are neither charitable nor concerned with the advancement of social welfare.

The society is not assisted by comparison with the provisions of the Miners' Welfare Act, 1952. The benefits conferred by that Act are provided by money provided by statute, while the benefits provided by the society come from the money of the beneficiaries themselves. The benefits provided by the society may be "welfare" but they are not "social welfare" within the meaning of section 8.

Pennycuick Q.C., in reply, submitted that the ejusdem generis rule did not apply, there being only one genus, and that it was impossible to construe the second limb of the section as something which would be charitable.

[In addition to the cases referred to in the judgment the following cases were also cited in argument: *Gilmour* v. *Coats*[4]; *Oppenheim* v. *Tobacco Securities Trust Co. and Others*[5]; *In re Hobourn Aero Components Ltd.*[6]; *General Nursing Council* v. *Marylebone Corporation*[7]; *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council*[8]; *British Launderers' Research Association* v. *Borough of Hendon Rating Authority*[9]; *Dunne* v. *Byrne*[10]; *Nash* v. *Hollinshead*[11]; *New York Life*

---

[3] (1877) 2 Ex.D. 268.

[4] [1949] A.C. 427; 65 T.L.R. 234; [1949] 1 All E.R. 848.

[5] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[6] [1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501.

[7] [1957] 2 All E.R. 791.

[8] [1957] 1 W.L.R. 764; [1957] 2 All E.R. 405.

[9] [1949] 1 K.B. 462; 65 T.L.R. 103; [1949] 1 All E.R. 21.

[10] [1912] A.C. 407; 28 T.L.R. 257.

[11] [1901] 1 K.B 700; 17 T.L.R. 352.

Insurance Co. v. *Style*[12]; *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*[13]; and *In re Nottage*.[14]]

Cur. adv. vult.

July 30. PARKER L.J. read the following judgment of the court: This is an appeal from a decision of the Divisional Court, dismissing an appeal by way of case stated from Lincoln (Parts of Lindsey) Quarter Sessions, who held that the appellant society were not entitled to the benefit of rating relief provided by section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The provision in question and the facts are fully set out in the report of the case in the Divisional Court,[1] and we need not repeat them.

The short question here is whether the society's convalescent home at North Parade, Skegness, is occupied for the purposes of an organization which is not established or conducted for profit, and whose main objects are charitable or otherwise concerned with the advancement of social welfare. Only if those conditions are complied with will the society be entitled to partial relief against rates in respect of those premises.

We will deal first with the question whether the appellant organization is established or conducted for profit. It conducts mutual insurance among its members and in carrying on that activity it has accumulated very considerable reserves in the form of investments in securities and in land. Indeed, we think that if that activity is properly conducted the accumulation of such reserves is not only inevitable but a necessity. From time to time, when those investments are sold, profits are made and the income and rents obtained are also in the nature of profits. The organization accordingly does earn profits from which the members benefit, but that, as it seems to us, is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organization is established or conducted for profit. It carries on no "business" for the purpose of earning profits: cf. *Reg.* v. *Whitmarsh*.[2] The appellants, accordingly, comply with the first condition.

Coming to the second condition, the meaning of "charitable" in the legal sense is clear, though its application is often difficult.

---

[12] (1889) 14 App.Cas. 381; 5 T.L.R. 621.

[13] [1948] A.C. 31; 63 T.L.R. 424; [1947] 2 All E.R. 217.

[14] [1895] 2 Ch. 649; 11 T.L.R. 519.

[1] [1957] 1 Q.B. 531.

[2] (1850) 15 Q.B. 600.

Except in the case of the relief of poverty, the object or purpose to be charitable must involve some benefit to the community or a section of the community as opposed to benefit to individuals by reason of some private qualification. That being so, it cannot be said that any object of the appellant organization is charitable. But are its main objects "or otherwise concerned with the "advancement of . . . social welfare"? Quite obviously the words "or otherwise" extend the objects in respect of which relief is given to objects which are not charitable in the legal sense. The real question is how far that extension goes. The provision in question is an exemption from rates at the expense of the general body of ratepayers, and that being so it would, we think, be right in the case of any doubt to give the words a restricted meaning.

What, then, is meant by "social welfare"? "Welfare," we think, denotes a state of being well, whether in the physical, mental or material sense. What the word "social" adds is far from clear, but in this context we should have thought that, prima facie, it meant the well-being of individuals as members of society. The expression "social welfare," therefore, is very wide and very vague. As Lord Tucker said in *Inland Revenue Commissioners* v. *Baddeley*,[3] in considering the phrase "the promotion of social well-being": "This is an extremely vague phrase "which may have different meanings to different minds and "may include things considered by some, but not by others, to "be advantageous. It would appear to cover many of the "activities of the so-called 'welfare State' and to include "material benefits and advantages which have little or no relation "to social ethics or good citizenship, concepts which are themselves not easily definable. I find it impossible to construe "these trusts in such a way as to restrict the operation of this "language to promoting or inculcating 'those standards of "'secular conduct and behaviour . . . expected of a good "'neighbour and a good citizen' as the Court of Appeal have "done." Unless, therefore, some restriction can be implied from the context, we should have thought that the provision of benefits which tends directly to improve the health or conditions of life of individuals comes prima facie within the expression "social welfare."

The respondent council, however, contend that notwithstanding the introductory words "or otherwise," the objects

---

[3] [1955] A.C. 572, 613; [1955] 1 All E.R. 525.

C. A.
1957

NATIONAL DEPOSIT FRIENDLY SOCIETY TRUSTEES *v.* SKEGNESS URBAN DISTRICT COUNCIL.

which follow must be restricted to objects in which an eleemosynary element is present, and which are for the benefit of the community or a section of the community in the sense in which charitable objects must be. It is said that this is the effect of an application of the ejusdem generis rule or, at any rate, is to be derived from the maxim noscitur a sociis. In our judgment, however, it is impossible to give the objects this restricted meaning. There are clearly grave difficulties in applying the ejusdem generis rule in such a case as this where there is only one species available out of which to construct a genus: cf. *Stag Line Ltd.* v. *Foscolo Mango & Co.*,[4] *per* Lord *Russell*,[5] and *Rex* v. *Special Commissioners of Income Tax, Ex parte Shaftesbury Homes and Arethusa Training Ship*,[6] *per Bailhache* J.[7]

It is true that in the former case the House of Lords restricted a power in a bill of lading to call at any ports " for bunkering " or other purposes " to purposes of the contract venture, but as a matter of business such a restriction was clearly necessary, and the power itself was expressly stated to be " as part of the " contract voyage." Further, it is to be observed that in *Attorney-General* v. *Seccombe*,[8] Hamilton J. (as he then was) held that the words " or otherwise " following the words " by " contract " must be read as denoting an arrangement ejusdem generis with contract, namely, an enforceable agreement. In the present case, however, the words to be construed are not " or " otherwise " alone, but " or otherwise " followed by specific objects.

Moreover, two of the objects, the advancement of religion and the advancement of education, are themselves charitable objects, and if they are to have any extended meaning they must, we think, be read as not being restricted to cases which are for the benefit of the community or a section of the community.

We think, however, that the restriction, if any, is to be found in the phrase " objects . . . concerned with the advancement of " . . ." We omit for this purpose reference to " main objects," since this may well merely differentiate the test from cases where the word " exclusively " is used: cf. Scientific Societies Act, 1843. Are, then, the objects of the organization in any particular case concerned with the advancement of social welfare? An organization may in fact advance social welfare in the sense of

[4] [1932] A.C. 328; 48 T.L.R. 127.
[5] [1932] A.C. 328, 345.
[6] [1922] 2 K.B. 729.
[7] Ibid. 740, 741.
[8] [1911] 2 K.B. 688.

affording benefits to its members, but nevertheless not have as its object the advancement of social welfare as an end in itself or for its own sake. On the other hand, the fact that an organization affords benefits to its members would not necessarily prevent its object being concerned with the advancement of social welfare.

Thus, in *Commissioners of Inland Revenue* v. *Forrest*,[9] the question was whether the property of the Institution of Civil Engineers was "appropriated and applied for the promotion of "science." Lord Macnaghten said[10]: "Is the property of the "Institution of Civil Engineers legally appropriated and applied "for the promotion of the science of civil engineering, or is it "legally appropriated and applied for the benefit of civil "engineers in order to enable them to practise their profession "to greater advantage? It cannot I think be doubted that the "institution has raised the standard of the profession, and that "to a civil engineer it is of advantage and probably of pecuniary "advantage to be a member. But is that result the purpose of "the society, or is it an incidental, though an important and "perhaps a necessary consequence of the way in which the "institution does its work in the pursuit of science?"

It is, we think, in considering this question, that the persons to be benefited and the source of the benefits become pertinent considerations. Where the benefits are confined to the members, and where these benefits are derived entirely from their own contributions, it may well be difficult to say that the object is the advancement of social welfare for its own sake, even though the benefits themselves may advance the well-being of the individual members. It is true that the question is whether the object is one "concerned" with the advancement of social welfare, but though "concerned" is a wide word, we do not think that it can be read as bringing in as an object something which is incidental.

Looked at in this way, we find it impossible to say that the main objects of the appellant organization are concerned with the advancement of social welfare. The objects of the society, as expressed in the rules and as found by quarter sessions to have been followed, are to provide by means of mutual insurance for the payment of certain benefits to the individual members. Granted that the payment of the benefits may amount to social welfare, nevertheless such benefits are confined to the individual members themselves; they are exclusively derived from the members' contributions on an actuarial basis; and default in payment of contributions disentitles a member to those benefits.

---

[9] (1890) 15 App.Cas. 334; 6 T.L.R. 456.

[10] 15 App.Cas. 334, 354.

Finally, we would like to adopt what Lord Goddard C.J. said in his opening observations in this case[11]: "If this society is "entitled to have the benefit of these provisions, so must many "others of the great friendly societies which exist. Speaking for "myself, I should think it was remarkable, if Parliament had "intended that societies which carry on the activities which this "and kindred societies do should have special treatment with "regard to rates, that it did not so provide in plain terms, in "just the same way as in some of the taxing statutes; and, after "all, rating statutes are taxing statutes in one sense." The appeal is dismissed.

Appeal dismissed.

Solicitors: *Woolley, Tyler & Bury; Wrentmore & Son.*

A. W. G.

[11] [1957] 1 Q.B. 531, 537.

1957
June 28.

Lord Goddard C.J., Byrne and Devlin JJ.

REGINA *v.* MEDICAL APPEAL TRIBUNAL AT LONDON. *Ex parte* BURPITT.

National Insurance—Industrial injuries benefit—"Paired organs" principle—Injury to fingers—Fingers part of the hand—Hands paired organs—National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (*S.I.* 1948, *No.* 1372), *reg.* 2 (5).

In 1948 B. injured a finger on his right hand. In June, 1956, he injured two fingers on his left hand. The latter injury arose out of, and in the course of, employment in respect of which he was insured under the National Insurance (Industrial Injuries) Act, 1946. The medical board which examined B. assessed his disablement from loss of faculty at three per cent. for life. It did not take into account the injury to the right hand in 1948.

On appeal to the medical appeal tribunal on the ground that the "paired organs" principle, in regulation 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948,[1] should

[Reported by David Calcutt, Esq., Barrister-at-Law.]

---

[1] National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, reg. 2: "Assessment of disablement "and prescribed degrees of disable- "ment. . . . (5) Where as a result "of the relevant accident a claimant "has suffered an injury to an organ "of his body which in a person "whose physical condition is normal "would be one of two similar organs,

have been applied, it was held that fingers were not organs; and that, even if they were, their functions were neither interchangeable nor complementary:—

Held, that fingers were part of the hand, that the hands were organs, and that their functions were interchangeable or complementary: if an injury to the fingers of one hand was followed by an industrial injury to the fingers of the other, the "paired organs" principle should be applied.

APPLICATION for order of certiorari.

In 1948 the applicant, William George Burpitt, injured the middle finger of his right hand. On June 5, 1956, he injured the index and middle fingers of his left hand. The injury to the left hand arose out of, and in the course of, his employment in respect of which he was insured under the National Insurance (Industrial Injuries) Act, 1946. On July 24 he was examined by a medical board, and on August 2 he was informed that "the medical "board which examined you on July 24, 1956, has decided that "(1) a loss of faculty has resulted from the industrial accident of "June 5, 1956; (2) the extent of disablement resulting from the "loss of faculty is to be assessed at three per cent. . . . from "June 8, 1956, [for] life. This is a final assessment. The "findings of the medical board are summarized as follows: "Conditions taken into account by the assessment: trigger finger "left index finger and laceration of left middle finger. Effect of "above conformity: trigger finger deformity left index finger. "Conditions neither due to nor made worse by the accident . . . "and not taken into account by the assessment: trigger finger "right middle finger due to injury eight years ago . . ."

On August 30, 1956, the applicant appealed from this decision to the Medical Appeal Tribunal at London on the ground that the assessment was inadequate and that the "paired organs" principle, i.e., that the provisions of regulation 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, should have been applied. On September 27 the tribunal

---

"the functions of which would be "interchangeable or complementary, "in assessing the extent of the disablement resulting from the relevant loss of faculty for any period "during which the claimant may be "expected to be subject to any disability resulting from that injury— "(*a*) any disability in respect of the "other organ to which the claimant "would in any case have been subject "by reason of a congenital defect, or "an injury or disease received or "contracted before the relevant accident and not attributable to any "accident against which he was insured under the Act, shall nevertheless be treated as having been "incurred as a result of the relevant "loss of faculty; . . ."

dismissed the appeal; their reasons for so doing are fully set out in the judgment of Lord Goddard C.J.

David Turner-Samuels for the applicant. An injury to the finger is an injury to the hand: the finger is a mere appendage to the hand. The hand is an organ: it is the organ of prehension. That organ is one of two similar organs, the functions of which are interchangeable or complementary. The medical appeal tribunal never considered whether a hand was an organ. Certiorari is the proper remedy: *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore.*[2]

Rodger Winn for the Ministry of Pensions and National Insurance and for the tribunal. Mr. Turner-Samuels' argument is accepted. The problem has, in the past, been answered differently by different tribunals. The minister will welcome a clear, authoritative, ruling.

LORD GODDARD C.J. Mr. Turner-Samuels moves on behalf of one William George Burpitt for an order of certiorari to bring up and quash a decision of the Medical Appeal Tribunal for the London district, notification of which was given to the applicant on October 15, 1956, under the National Insurance (Industrial Injuries) Act, 1946. The decision is in these terms: "The "assessment by the medical board of three per cent. for life in "respect of the injured left index and middle fingers is not in "question. On behalf of the claimant, however, it has been "submitted that the 'paired organs' principle should be applied "because of a previous injury, eight years ago, to the right "middle finger. We are unable to accept this submission. The "two fingers concerned are not 'organs' in our opinion. Even "could they be so regarded their functions are not interchange- "able nor complementary."

The applicant sustained an injury to his left hand involving his left index and middle fingers, for which he was entitled to compensation. He had some years ago sustained an injury to the middle finger of his right hand, and he therefore contended —the exact nature of the injury does not matter—that the two injuries should be aggregated and he should be compensated on the footing that it was a more serious injury to him losing his fingers of the left hand because of the previous injury to his right hand.

---

[2] [1957] 1 Q.B. 574; sub nom. *In re Gilmore's Application* [1957] 1 All E.R. 796.

By the statutory regulations,[1] which are made complementary to the Act of 1946, it is provided: "Where as a result of the "relevant accident a claimant has suffered an injury to an organ "of his body which in a person whose physical condition is "normal would be one of two similar organs, the functions of "which would be interchangeable or complementary, in assessing "the extent of the disablement resulting from the relevant loss "of faculty for any period during which the claimant may be "expected to be subject to any disability resulting from that "injury—(*a*) any disability in respect of the other organ to which "the claimant would in any case have been subject by reason of "a congenital defect, or an injury or disease received or con-"tracted before the relevant accident and not attributable to any "accident against which he was insured under the Act, shall "nevertheless be treated as having been incurred as a result of "the relevant loss of faculty; (*b*) subject as hereafter provided "in this regulation, any disability in respect of the other organ "to which the claimant would not have been subject but for "some injury or disease received or contracted after the relevant "accident and not attributable to that accident or any other "accident against which he was insured under the Act, shall be "treated as having been incurred as a result of the relevant loss "of faculty." That, colloquially speaking, means that the two injuries are to be aggregated together to find the total disability from which this man suffered.

The first question that arises is whether fingers are organs. A finger is part of a hand. I think we have to consider not only whether a finger is an organ, but whether a hand is an organ, because if a hand is an organ an injury to a finger is covered because the finger is part of the hand. I can understand the difficulties medical tribunals have had on this matter, because I think that at any rate a layman would have thought of a hand as a limb and not an organ, but we find the definition of "organ" in the most authoritative work, the Oxford English Dictionary—and we have to construe these regulations according to the ordinary meaning of words—as "a part or member of an animal "adapted by its structure for a particular vital function, as "digestion, respiration, excretion, reproduction, locomotion, "perception, etc." Then it goes on to give various illustrations. Locomotion would seem to include legs or feet; but it is not necessary for us to decide that. I think a hand is an organ; it is an organ of the human body which enables grip to be applied to

---

[1] See footnote on p. 584.

1957

REGINA
v.
MEDICAL
APPEAL
TRIBUNAL
AT LONDON.
Ex parte
BURPITT.

Lord Goddard
C.J.

any article. The hand is the organ of prehension. If it is the organ of prehension, the fingers are part of the organ of prehension because if a man has no fingers he has no grip. I think, therefore, that we must say that there is an error on the face of this award.

The decision goes on: "Even could they [the fingers] be so "regarded, their functions are not interchangeable nor complementary." Once you establish that they are part of an organ, it must follow that they are interchangeable or complementary because one hand is complementary to the other. If a person grips a thing or seizes a thing or lifts weights he must use his other hand to do it. I do not think that "complementary" can be limited to such things as the eyes and kidneys. Once you have established that the hand is an organ it seems to me you have the pair at once. You have a pair of hands in the same way as a pair of legs. I do not wish to be taken as deciding that legs are necessarily organs; that may have to be decided in some other case. We are concerned with hands and fingers. For the reasons I have endeavoured to give I think that the medical tribunal were in error and the opinion that should prevail is that fingers are part of an organ, the organ being the hand, and the hands are complementary. For these reasons the motion succeeds.

BYRNE J. I agree.

DEVLIN J. I agree. The only doubt I think there may be about the point is that in ordinary language a hand would be considered as part of a limb, namely, the arm, rather than as an organ, and the section of the regulations makes no reference to limbs. I cannot help feeling that such an omission must be deliberate, because whoever framed the section must have been well aware that there are pairs of limbs as well as pairs of eyes and other organs of sense, and it would have been natural to include the limbs specifically if that is what was intended. But, as my Lord has said, we have not here to consider the case of arms or legs, which might well be governed by different considerations, but the case of a hand and fingers, and for the reasons he has given I agree that the hand should be regarded as an organ.

Application allowed.

Solicitors: *W. H. Thompson; The Solicitor, Ministry of Pensions and National Insurance.*

[COURTS-MARTIAL APPEAL COURT.]

C.-M. A. C.

REGINA *v.* LOGAN AND OTHERS.

1957
June 21.

Lord Goddard C.J., Byrne and Devlin JJ.

Statute—Commencement—Date—Act applicable abroad—To come into force on January 1, 1957—*Offences committed by troops in Hong Kong on January* 1, 1957, *by Hong Kong time—In advance of Greenwich mean time—Act not in force in Great Britain—Whether in force in Hong Kong—Army Act,* 1955 (3 *&* 4 *Eliz.* 2, *c.* 18), *s.* 226 (2)—*Army Act,* 1955 (*Commencement*) *Order,* 1955 (*S.I.* 1955, *No.* 1805).

British soldiers stationed in Hong Kong were convicted of offences under section 70 of the Army Act, 1955, which, by Order in Council [1] made under section 226 (2) of the Act, came into force on January 1, 1957. The offences were committed on January 1, 1957, at 2.30 a.m. Hong Kong standard time. Hong Kong time being eight hours in advance of Greenwich mean time, the Act of 1955 had not in fact come into force in England at the time that the offences were committed. On appeal against conviction, on the ground that at the material time the Act was not in force in Hong Kong:—

Held, that as the Act was expressed to come into force on January 1, 1957, it did so on the day which was in fact January 1, 1957, in each country to which it applied where British troops were stationed; and, accordingly, was in force in Hong Kong at the time when the offences were committed.

APPEALS against conviction.

The appellants, Corporal John James Logan, and Sappers Terence David Logan, Edward McKinnon and Malcolm Lloyd Calvert, of 24 Field Engineer Regiment stationed in Hong Kong, were jointly charged with committing a civil offence contrary to section 70 of the Army Act, 1955, namely, assault occasioning actual bodily harm, in that they at Hong Kong on January 1, 1957, at about 0230 hours (2.30 a.m.) Hong Kong standard time assaulted Jack Brighton thereby occasioning him actual bodily harm. Two other charges in respect of other assaults were also preferred framed under the same Act.

The actual time at which the offences were committed, namely, "2.30 a.m. Hong Kong standard time," was inserted by amendment at the trial in order that a preliminary objection taken on behalf of the defendants could be dealt with. It was submitted on their behalf that as Hong Kong standard time was eight hours in advance of English time the charges were bad in law as at the time that the alleged offences were committed, although it was 2.30 a.m. on January 1, 1957, by Hong Kong time, it was 6.30 p.m. on December 31, 1956, by English time, and the Army Act, 1955, had not then come into operation in England.

---

[1] Army Act, 1955 (Commencement) Order, 1955 (made under s. 226 (2) of the Army Act, 1955): "(1) The Army "Act, 1955, shall come into operation "on January 1, 1957."

The objection was overruled on a direction by the Deputy Judge Advocate that the Army Act, 1955, came into force in Hong Kong on January 1, 1957, by Hong Kong local time. The appellants were convicted. They appealed on the ground that the Deputy Judge Advocate was wrong in law in directing the court to disallow the objection.

David Lloyd for the appellants. A British Act of Parliament must come into force at one time all over the world. By section 36 (2) of the Interpretation Act, 1889, an Act which is expressed to come into operation on a particular day shall be construed as coming into operation immediately on the expiration of the previous day. Thus, the Army Act, 1955, came into operation immediately on the expiry of December 31, 1956, that is to say, at midnight on that day. The Interpretation Act, 1889, must be read in conjunction with the Statutes (Definition of Time) Act, 1880, which provides that any expression of time occurring in any Act of Parliament shall, unless otherwise stated, be held to be Greenwich mean time. It is true that the latter Act applies in terms only to Great Britain, but there is no other Act which applies directly to a statute which operates abroad. Greenwich mean time must be the proper standard to apply. It would be strange if it were to be accepted that a British Act of Parliament can come into operation in other parts of the world before it comes into operation in Great Britain; it might mean that a man could be charged with committing a crime before the statute under which it was committed had been passed.

E. Garth Moore for the Crown was not called on.

LORD GODDARD C.J., delivering the judgment of the court. The appellants were convicted before a district court-martial at Hong Kong of the offence of "committing a civil offence contrary "to section 70 of the Army Act, 1955, that is to say, assault "occasioning actual bodily harm, in that they at Hong Kong on "January 1, 1957, at about 0230 hours"—that is 2.30 a.m.—"Hong Kong standard time assaulted Jack Brighton thereby "occasioning him actual bodily harm."

An ingenious solicitor who appeared before the court-martial persuaded them to put in the exact time of the alleged offences, 2.30 a.m., and then took the point that as Hong Kong time was some hours in front of Greenwich mean time the Army Act, 1955, was not in force in Hong Kong at the time that this offence was committed. The Army Act, 1955 (Commencement) Order, 1955, made under section 226 (2) of the Army Act, 1955, provides that the Act shall come into force on January 1, 1957; but the Army Act is effective not only in this country, but in any country in which British troops are stationed; so that, if troops are stationed in Hong Kong, the Army Act applies to them. If an Act is said to come into force on January 1, it comes into force on the day which is January 1 in the particular place where the Act has to be applied. I can well understand that if an offence were committed in the Western Atlantic the Act might not be in force there on the same day as it would in London because the date might still be December 31 there, but the fact that it became January 1 in Hong Kong a few hours before the clock would actually show January 1 in England does not make any difference. As the Act comes into force on January 1, 1957, in Hong Kong, it comes into force on the day which is January 1 in Hong Kong. Therefore, this point fails and the appeal is dismissed.

Appeals dismissed.

Solicitors: *Registrar, Courts-Martial Appeal Court; Director of Army Legal Services.*

E. M. W.

REGINA *v.* CRASKE.
Ex parte METROPOLITAN POLICE COMMISSIONER.

1957
July 2.

Lord Goddard C.J., Byrne and Devlin JJ.

Justices—Election to go for trial—Indictable offence triable summarily —Consent to summary trial—Magistrate's right to allow accused to withdraw consent — Power of court to proceed to inquire as examining justices—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 19 (5), 24.

A youth over 17 but under 21 years of age appeared before a metropolitan magistrate charged, inter alia, with receiving a motor-car knowing it to have been stolen, an indictable offence triable

1957

REGINA
v.
CRASKE.
Ex parte
METROPOLITAN
POLICE
COMMISSIONER.

summarily, under section 19 of the Magistrates' Courts Act, 1952,[1] with the consent of the accused. The provisions of that section having been complied with, the accused consented to summary trial. After a plea of not guilty had been taken the magistrate adjourned the proceedings to enable the accused to be legally represented. At the adjourned hearing the magistrate allowed the accused to withdraw his consent to summary trial and did not proceed summarily to try that charge.

The prosecutor moved (1) for an order of prohibition directed to the magistrate to prohibit him from inquiring into the case as an examining magistrate, and contending that he was precluded by section 24 of the Act of 1952 from so doing as he had begun to try the case summarily; (2) for an order of mandamus directing him to proceed with the summary trial on the ground that he was bound in law so to do by virtue of section 19 (5):—

Held (*per* Lord Goddard C.J. and Byrne J.), that a magistrate had not "begun to try" an information for an indictable offence summarily within the meaning of section 24 until he had begun to hear the evidence in the case; the section did not operate, merely because the plea had been taken, to preclude the magistrate from allowing the accused to change his election and to proceed to inquire into the charge as an examining magistrate.

Per Devlin J. The word "shall" in section 19 (5) was used in relation to the object of the section, namely, to lay down the steps to be taken before the magistrate could proceed to a summary trial, but the words of section 19 (5) could not be so construed as

---

[1] Magistrates' Courts Act, 1952, s. 19: "(1) The following provisions "of this section shall have effect "where a person who has attained "the age of 17 appears or is "brought before a magistrates' court "on an information charging him "with any of the indictable offences "specified in the First Schedule to "this Act. (2) If at any time during "the inquiry into the offence it "appears to the court . . . that the "circumstances do not make the "offence one of serious character and "do not for other reasons require trial "on indictment, the court may proceed with a view to summary trial. "(3) For the purpose of proceeding as "aforesaid, the court shall cause the "charge to be written down, if this "has not already been done, and read "to the accused and shall tell him "that he may, if he consents, be "tried summarily instead of being "tried by a jury and, if the court "thinks it desirable for his information, shall tell him before what "court he would be tried if tried by a "jury and explain what is meant by "being tried summarily. (4) Where "the offence with which the accused "is charged is triable by quarter "sessions, the court shall also explain "to him that if he consents to be "tried summarily and is convicted ". . . he may be committed to quarter "sessions under section 29 of this Act "if the court . . . is of opinion that ". . . greater punishment should be "inflicted than the court has power "to inflict. (5) After informing the "accused as provided by the last two "preceding subsections the court shall "ask him whether he wishes to be "tried by a jury or consents to be "tried summarily, and, if he consents, "shall proceed to the summary trial "of the information."

S. 24: "Except as provided in "subsection (5) of section 18 of this "Act a magistrates' court, having "begun to try an information for any "indictable offence summarily, shall "not thereafter proceed to inquire "into the information as examining "justices."

to deprive the magistrate, once the procedure laid down in the section had been begun, of the ordinary right which a court must have in the interests of justice to give the accused an opportunity of reconsidering his decision if he had, ill-advisedly, given his consent to abandon his right to trial by jury.

Accordingly, the magistrate was right in the decision he had reached and the motions must be discharged.

APPLICATIONS for orders of prohibition and mandamus.

On May 6, 1957, one George Hayden Rees, a youth over 17 but under 21 years of age, appeared before Mr. Arthur Craske, the metropolitan magistrate sitting at the South Western Magistrates' Court, charged with four offences in relation to a motor-car. The first charge alleged that he, between March 31 and April 20, 1957, received a motor-car knowing it to have been stolen contrary to section 33 of the Larceny Act, 1916. That was an indictable offence triable summarily under section 19 of the Magistrates' Courts Act, 1952, providing that the provisions of the section were complied with and the accused consented. The second charge, an offence triable either on indictment or summarily, alleged the taking and driving the car away without the consent of the owner contrary to section 28 of the Road Traffic Act, 1930; the third and fourth charges were offences triable summarily, namely, driving the car while disqualified and without insurance.

It appeared from his affidavit that the solicitor appearing for the prosecution invited the magistrate to proceed to summary trial of the first two charges and the magistrate determined to do so. Rees, having been given the statutory cautions, consented to be tried summarily on the receiving charge. He was thereupon asked whether he pleaded "guilty" or "not guilty" to the four charges and he pleaded "not guilty" to each charge. At his request the hearing was then adjourned until May 28, 1957, to enable him to be legally represented.

At the adjourned hearing on May 28 Rees appeared again before the same magistrate at the same court and, through his counsel, asked the magistrate to allow him to withdraw his consent to summary trial upon the charge of receiving, and for the magistrate to proceed to inquire into that charge and the charge of taking and driving away as an examining justice with a view to committing Rees for trial by jury. Counsel for Rees submitted that section 24 of the Magistrates' Courts Act, 1952, did not apply to the receiving charge as the magistrate had not begun to try the case. The prosecuting solicitor requested the magistrate to proceed with the summary trial of the receiving charge, but the magistrate decided to allow Rees to change his election upon the receiving charge and to inquire into it and the second charge as an examining justice with a view to committal for trial.

The magistrate then proceeded to the summary trial of the two summary offences charged and remanded Rees until June 18, 1957, for sentence. Upon the charges of receiving and taking and driving away evidence in deposition form of the arrest and charging of Rees was taken and the inquiry was then adjourned.

The Commissioner of Police moved for an order of prohibition prohibiting the magistrate from proceeding further in inquiring as an examining justice into the offence of receiving the motor-car, and an order of mandamus ordering him to hear and determine the case according to law. It was contended for the applicant (a) that the magistrate had no jurisdiction to proceed to inquire into the receiving charge as examining justice because, having begun to try the charge summarily, he was precluded by section 24 of the Magistrates' Courts Act, 1952, from proceeding thereafter to inquire into it as an examining justice, and (b) that the provisions of section 19 (5) of the Magistrates' Courts Act, 1952, were mandatory and the magistrate was bound in law to proceed with the summary trial of the receiving charge.

The magistrate, in an affidavit submitted to the Divisional Court, stated that he accepted the argument of counsel for Rees that section 24 of the Act of 1952 did not apply to the receiving charge as he had not begun to try the case summarily or to address his mind at all to the question of innocence or guilt. He did not consider that section 19 (5) of the Act prevented him in the circumstances from allowing Rees to change his election upon the receiving charge. He had regard to the fact that Rees was under 21 years of age, and had not at his first appearance been legally represented, and had obviously been advised subsequently that it was not in his best interests to elect for summary trial; that a refusal to allow him to change the election might give rise to a feeling that an injustice had been done.

J. H. Buzzard for the Commissioner of Police. The magistrate was prohibited by section 24 of the Magistrates' Courts Act, 1952, from proceeding to inquire into the information as an examining magistrate because he had "begun to try" the case summarily. The procedure for the trial of indictable offences triable summarily is governed by section 19 of the Act. By subsection (5) an accused person is to be invited to elect whether to go for trial or to be tried summarily. If he consents to summary trial the subsection provides that "the court . . . shall proceed "to the summary trial of the information." The words of that subsection are mandatory. Everything which takes place after the accused has given his consent is part of the summary trial. In the present case not only had consent to summary trial been given but the plea of "not guilty" had been taken. It is clear from section 13 of the Act that the plea is part of the trial. In the case of a plea of "guilty" there can be no question but that the trial has begun when the plea is made. Once that plea has been made the trial is almost over. If here there had in fact been a plea of "guilty," the magistrate must have proceeded to the summary trial of the information. It ought not to be different in the case of a plea of "not guilty." Having regard to the clear words of sections 19 (5) and 24, on which reliance is placed, these applications should be allowed.

Rodger Winn for the magistrate. There is nothing in the words of sections 19 (5) or 24 which prevented the magistrate taking the action he did. The words used in section 19 (5) are "the court . . . shall proceed to the summary trial of the "information" and not "the court . . . shall proceed with . . ." The words of the subsection clearly mean that the court shall proceed towards the trial and not continue that which has been begun. The applicant's argument under section 13 is weakened by the opening words of section 14, under which a magistrate has power to adjourn the trial of an information at any time whether before or after beginning to try it. The plea is not part of the trial; it is an introductory step which takes place before the trial begins. That is just as true in the magistrates' courts as it is in the assize courts. The magistrate has first to find out what he has to try; the trial itself only begins when the magistrate first applies his mind to the issue which he has to try. The applications should be refused.

Desmond Vowden, for Rees, adopted Rodger Winn's argument.

Lord Goddard C.J. stated the facts and continued: Mr. Buzzard, on behalf of the Commissioner of Police, moves for an order of prohibition prohibiting the magistrate from acting as examining justice and sending the accused for trial, and also moves for an order of mandamus ordering the magistrates of the metropolis, or one of them, to hear and determine the case according to law.

The matter depends entirely on the sections of the Magistrates' Courts Act, 1952, under which persons accused of certain indictable offences can be tried, as many of them are, by a magistrate, and do not have to be sent for trial. The first of those sections is section 19, which has altered considerably the procedure which used to obtain under the Summary Jurisdiction Act, 1879, which was the first Act under which accused persons, except juveniles, could be tried on indictable offences before magistrates. Section 19 (2) provides: "If at any time during the inquiry into the "offence it appears to the court,"—having regard to various matters which are then set out—"that the circumstances do not "make the offence one of serious character and do not for other "reasons require trial on indictment, the court may proceed with "a view to summary trial. (3) For the purpose of proceeding as "aforesaid, the court shall cause the charge to be written down, "if this has not already been done, and read to the accused and "shall tell him that he may, if he consents, be tried summarily "instead of being tried by a jury and, if the court thinks it "desirable for his information, shall tell him before what court "he would be tried if tried by a jury and explain what is meant "by being tried summarily." In other words, something almost equivalent to an indictment, that is to say, a written charge, is to be preferred and is to be read to the accused just as at the assizes the indictment is read to the accused. He has also to be told under section 19 (4) that if he is tried and convicted summarily the court may send him to quarter sessions for sentence.

Section 19 (5) provides: "After informing the accused as "provided by the last two preceding subsections the court shall "ask him whether he wishes to be tried by a jury or consents to "be tried summarily, and, if he consents, shall proceed to the "summary trial of the information." No person who is charged with an indictable offence can, except with his own consent, be deprived of the right to be tried by jury.

The words of section 19 (5), as I repeat again, are: "the court "shall ask him whether he wishes to be tried by a jury or consents to be tried summarily, and, if he consents, shall," as Mr. Rodger Winn pointed out, "proceed to the summary trial of the "information." So, after the consent has been given, the court is to proceed to trial.

Section 24 provides: "Except as provided in subsection (5) "of section 18 of this Act, a magistrates' court, having begun to "try an information for any indictable offence summarily, shall "not thereafter proceed to inquire into the information as examin-"ing justices." I say, in parenthesis, that we need not consider section 18 which deals with informations for offences triable either summarily or by indictment by the Act which creates the offence.

We now come to the question whether a person having elected, the magistrate, having heard that he elects and pleads not guilty but having gone no further, can allow him to withdraw his election and say instead: "I elect to go for trial by jury." In my opinion he can.

Mr. Buzzard has contended that the fact that the prisoner has elected and pleaded has started the trial, so that the magistrate has begun to try the case, but I think that if one has regard to the whole scope of section 24 the magistrate has not begun to try the case until, at any rate, he begins to hear the evidence. I cannot think that Parliament meant to create a wholly different state of affairs in magistrates' courts with regard to indictable offences from that which prevails at an assize or quarter session where a prisoner, who is brought up for trial, has had the indictment read to him and has pleaded guilty, is constantly allowed to withdraw his plea. He can of course do so before the jury is empanelled. It does not seem to me that the trial at the assizes begins until the jury is empanelled to try the case and the prisoner is put in charge of the jury. I think that if it had been intended that in the magistrates' court an election, once given, could never be withdrawn, section 24 would have been worded very differently.

It would be the inevitable result of Mr. Buzzard's argument that if an accused person, having come before magistrates and elected to be tried summarily, perhaps in the absence of his solicitor, who might have been late, then, when the solicitor arrives, before the magistrates had begun to try the case, and says to the accused: "You ought not to have elected to be tried "summarily; I was going to advise you to go for trial," it would be said although the magistrates had not heard a word of the evidence, that the accused could not withdraw his election and say that he desired to go for trial.

I do not think that one should lightly deprive persons of their right to be tried by a jury if they want to. I agree with Mr. Buzzard that the whole matter is statutory, but I do not find anything in this case which obliges me to hold that the magistrate had begun to try the case, when in fact all that had happened was that he had taken the plea. The plea joined issue, and once issue was joined he had to start to try the case, but

1957

REGINA v. CRASKE. *Ex parte* METROPOLITAN POLICE COMMISSIONER.

Lord Goddard C.J.

he had not started to do so. He could only have proceeded to try it as a summary offence so long as the election stood, but I do not think it would be a correct reading of these sections to say that once the election has been given, it has been given for all time, so that if the accused might have been advised, if his advocate had been present, to refuse summary trial, he would not be allowed, when his advocate did arrive, to elect to go for trial before a jury.

For my part I am content to rely upon the words in section 24 of the Act. In my view that section does not apply except where the magistrates have begun to hear the evidence, and the mere taking of the plea is not enough. For these reasons I think these motions should be discharged.

BYRNE J. I agree with the judgment proposed by my Lord. The question is when can it be said that a magistrates' court has begun to try an information for an indictable offence summarily. Plainly, to my mind, two things must take place before the court begins to try the information. One of those things is that there must be an election by the accused, and the next thing is that there must be a plea entered by him; after that evidence will be heard which, in my view, is the beginning of the trial.

As my Lord has pointed out, the analogy is plain. At courts where cases are tried by jury one knows perfectly well that the accused enters a plea, and he may not be tried, in the case of quarter sessions or assizes, for a fortnight after the plea has been entered. His trial does not take place until he has been given in charge of the jury and evidence is led. To say that in this case the trial began when an election had been made and a plea entered is, in my view, straining the language of the statute, and it is straining it against the liberty of the subject, because it is to my mind of great importance that a right that any person may have to be tried by jury should be preserved. For those reasons I agree that these motions should be discharged.

DEVLIN J. I agree with the conclusion which has been proposed by my Lords, and I am far from dissenting from the reasons which they have given for it, but I find rather more difficulty than they have about the point as to whether the trial does or does not begin with the plea, having regard to sections 19 and 24 of the Act of 1952 to which Mr. Buzzard referred us. If the case had to be decided on that ground alone, I might have felt it desirable for my own part to give further consideration to that point. But the substance of the matter can be dealt with on another ground as well as that which my Lords have mentioned, and I should like therefore to support my conclusion by some reference to it.

Suppose that the trial of the information has begun, because the plea has been taken. Is there any reason why a magistrate in those circumstances, if he ascertains that the accused wants to change his election, should not allow him to do so? There is a reason why, if he decides that the accused ought to be allowed to change, he should not proceed with the committal proceedings himself, and that is because of the terms of section 24. But the substance of this matter is not whether Mr. Craske should proceed with the committal proceedings—that is a mere matter of procedure. Mr. Craske does not propose to proceed with it anyway, because he thinks it is desirable that another magistrate should deal with it. The real substance of the matter is whether the accused can be allowed at this stage to change his election. Mr. Buzzard submits that he cannot, and he bases that submission upon the words of section 19 (5). He puts his case as high as this, that once the accused has consented to be tried summarily a magistrate is bound to proceed to the summary trial of the information, and no magistrate can give the accused an opportunity of reconsidering his consent, unless, Mr. Buzzard is disposed to concede, it were done by mistake.

That would be a very cumbersome procedure if, when the accused wanted to change his mind half a minute after he had given his consent, there had to be an investigation whether he was acting under a mistake or not. I do not think the words of section 19 require so harsh and, as it seems to me, unreasonable a construction to be put upon them. I think that when Parliament uses the word " shall " in subsection (5) it is using it in relation to the object of this part of the section, which is, as is shown by subsection (3), to lay down the things that must be done before the trial is proceeded with, and the order in which they have to be done.

Subsection (3) begins: " For the purpose of proceeding as " aforesaid, the court shall cause the charge to be written down "; that is the first step, then the subsection lays down a number of other steps, and having taken all the necessary steps, and obtained the consent of the accused, the final step is that the court shall proceed to the summary trial of the accused. I do not think that means that once the procedure is set in motion,

1957
REGINA v. CRASKE. *Ex parte* METROPOLITAN POLICE COMMISSIONER.
Devlin J.

the court has ineluctably to allow the wheels to revolve without any power to stop them if the accused wants to change his mind. I think it means no more than this, that if the summary trial is to be proceeded with in the way in which section 19 provides, those are the steps that must be taken, but I can find nothing in the words of subsection (5) which would deprive a magistrate or any court of the ordinary right which they must have in the interests of justice of allowing an accused who has given his consent ill-advisedly to abandoning his right to a trial by jury, to be given the opportunity of reconsidering it.

I think therefore upon these grounds that the magistrate was right in the conclusion which he reached and I agree that the motions must be discharged.

Applications dismissed.

Solicitors: *Solicitor, Metropolitan Police; Treasury Solicitor; R. W. Platt.*

E. M. W.

C. A.
1957
May 28, 29; *June* 6.
Lord Goddard C.J., Romer L.J. and Devlin J.

EASTERN DISTRIBUTORS LTD. *v.* GOLDRING (MURPHY, THIRD PARTY).

Sale of Goods—Nemo dat quod non habet—Estoppel—Motor-car—Owner giving seller documents enabling seller to represent himself as owner—Limitation upon seller's authority—Sale without authority—Whether property passed—Hire-purchase agreement between purchaser and owner—Whether subsequent bona fide purchaser for value from former owner obtained good title—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 21 (1), 25 (1).

Hire-Purchase — Hire-purchase agreement — Enforceability — Blank forms signed by hirer—Whether "valid note or memorandum of "the agreement . . . made and signed by the hirer"—Unenforceable agreement—Whether right to possession of owner enforceable against third parties—Hire Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *ss.* 2 (2), 17.

Estoppel — By conduct — Motor-car — Hire-purchase — Owner of hire-purchase documents signed in blank and given to car dealer—Sale by car dealer to hire-purchase company—Representation by dealer of ownership—Owner privy to representation—Subsequent sale by owner—In whom title resides.

M., the owner of a Bedford van, wished to purchase a Chrysler motor-car from C., a dealer, but had insufficient funds to pay the required deposit. To overcome this C. suggested that M. should raise

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

C. A.

1957

EASTERN DISTRIBUTORS LTD. *v.* GOLDRING (MURPHY, THIRD PARTY).

the deposit on the security of the Bedford van, and that he, C., should pretend to the plaintiffs, a hire-purchase company, that M. wished to purchase both the van and the Chrysler and that M. had paid the necessary deposit on both of them. C. would keep the balance of the purchase price when he received it from the plaintiffs and M. would pay the instalments due under hire-purchase agreements on both vehicles. M. agreed and signed in blank four hire-purchase documents, namely, the proposal forms and memoranda of agreement for the Chrysler and the Bedford, and also signed a delivery note stating that he had taken delivery of the Bedford from C. C. completed the documents and forwarded them to the plaintiffs who, acting in good faith, accepted the proposal in respect of the Bedford but rejected that in respect of the Chrysler. C. had no authority to proceed in respect of the Bedford unless the transaction with the Chrysler also proceeded, but he nevertheless purported to sell the Bedford van to the plaintiffs. The plaintiffs completed the agreement and sent a counterpart to M. C. subsequently told M. that the whole transaction had been cancelled and M., who had made no payments under the hire-purchase agreement, sold the Bedford van to the defendant. At all times prior thereto the van had been in M.'s possession. The plaintiffs claimed the return of the van from the defendant:—

Held, (1) that by common law, as embodied in section 21 (1) of the Sale of Goods Act, 1893, where goods are sold by a person not the owner thereof but the owner is by his conduct precluded from denying the seller's authority to sell, the effect is to transfer a real title to the buyer, binding a later purchaser for value without notice from the owner, and not merely a metaphorical title by estoppel; accordingly, since C. was armed by M. with documents which enabled C. to represent that he was the owner of the Bedford with the right to sell it, M. was precluded from denying C.'s authority to sell it, and the plaintiffs acquired the title to the van and M. had no title left to pass to the defendant.

(2) That although the form of memorandum signed in blank by M. was not a note or memorandum of the hire-purchase agreement "made and signed by the hirer" as required by section 2 (2) (*a*) of the Hire Purchase Act, 1938, and the agreement was rendered unenforceable against M. by virtue of sections 2 (2) and 17 of the Act, those sections did not take away from the plaintiffs any rights to possession of the vehicle that they had against third parties.

(3) That even if M. and not C. was considered as being the seller of the van to the plaintiffs, M. retained possession of the van not as a seller remaining in possession but as a bailee under the hire-purchase agreement which, although unenforceable, was not void, and therefore M. did not pass any title to the van to the defendant by virtue of section 25 (1) of the Sale of Goods Act, 1893.

Staffordshire Motor Guarantee Ltd. v. *British Wagon Co. Ltd.* [1934] 2 K.B. 305 applied.

APPEALS from Judge Granville Smith, sitting at St. Albans County Court.

C. A.
1957

Eastern Distributors Ltd. v. Goldring (Murphy, Third Party).

The plaintiffs, a hire-purchase company, brought an action in detinue and conversion against the defendant in respect of a Bedford van which the defendant had purchased from the third party, Murphy.

The county court judge gave judgment for the plaintiffs, and the defendant and the third party appealed.

The facts are summarized in the headnote and set out fully in the judgment of the court delivered by Devlin J.

J. R. Phillips for the third party. The plaintiffs sued as owners; since it was admitted that the third party originally owned the Bedford van, the plaintiffs cannot succeed unless they discharge the onus of proving that they have subsequently acquired a title to it. They fail because the purported sale was not a sale by Coker as agent for the third party but two separate sales—the third party to Coker and Coker to the plaintiffs. Since the admitted intention was that the sale to Coker should be effective only if the transaction with the Chrysler was also effected, and since it was not so effected, there was no possibility of a sale by Coker to the plaintiffs. If the third party held out Coker as an owner, and is thereby estopped from denying the plaintiffs' title, the defendant was not privy to that representation and is not similarly estopped; in any event, an estoppel cannot confer a title in the strict sense of the word: see Spencer Bower's Estoppel by Representation (1923), p. 15, and *Bank of England* v. *Cutler*,[1] *per* Farwell L.J. Apart from estoppel the plaintiffs can show no title.

If the plaintiffs did acquire title, there was no memorandum in writing within the meaning of section 2 (2) (*a*) of the Hire Purchase Act, 1938, since the forms were blank when signed by the third party, and the plaintiffs were not entitled to enforce any right to recover the van: sections 2 (2) and 17 of the Act of 1938. As they could not enforce their right to recover the van they had no immediate right to possession and could not sue in conversion: *Kahler* v. *Midland Bank*.[2]

[Devlin J. The Act of 1938 does not provide that an owner does not have a right to possession. If a hirer sells a vehicle hired to him, the purchaser from him would be liable in conversion.]

The purchaser would have the same rights as the hirer.

[Devlin J. No, because the plaintiff would not be seeking to enforce the agreement but his right to possession.]

---

[1] [1908] 2 K.B. 208, 234.

[2] [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621.

If that were so the object of the Act would be defeated. It is the intention of the Act that hire-purchase companies should be penalized for failing to see that a proper memorandum is made.

If the third party did sell the van to the plaintiffs, the plaintiffs allowed him to remain in possession, and therefore by virtue of section 25 of the Sale of Goods Act, 1893, the defendant, who was a bona fide purchaser for value without notice of the previous sale, obtained a good title to the van.

Further, on a true analysis of the transaction it was a bill of sale void for want of registration: *Polsky* v. *S. & A. Services Ltd.*[3]

F. M. Drake for the defendant. The argument of the third party is adopted. There is no case in which it has been held that a bona fide purchaser for value without knowledge is bound by an estoppel operating between the transferor and the plaintiff. The passage in Cheshire & Fifoot's Law of Contract, 3rd ed., p. 395, which suggests that title can be transferred by estoppel, is unsupported by authority and is wrong.

C. L. Hawser for the plaintiffs. The third party armed Coker with apparent authority to sell the van and is estopped from denying that the property in the van passed to the plaintiffs: *Pickering* v. *Busk*,[4] *per* Lord Ellenborough C.J.[5] Title can be acquired by estoppel, and the property in the van did in fact pass to the plaintiffs: see Cheshire & Fifoot's Law of Contract, 3rd ed., p. 395, Benjamin on Sale, 8th ed., p. 13, and *Simm* v. *Anglo-American Telegraph Co.*,[6] *per* Cotton L.J.,[7] although Brett L.J.[8] appears to have taken the contrary view.

Section 25 of the Sale of Goods Act, 1893, is not applicable to this situation. The third party was a bailee under the hire-purchase agreement and, even if the agreement were unenforceable, the third party still held as a bailee under the agreement and not as a seller under the original agreement of sale: *Staffordshire Motor Guarantee Ltd.* v. *British Wagon Co. Ltd.*[9] Further, section 25 is not intended to apply where a buyer is unaware that the seller is remaining in possession because he has been led to believe that the seller is another person.

Cur. adv. vult.

[3] [1951] W.N. 256; [1951] 1 All E.R. 185, 1062n.

[4] (1812) 15 East 37.

[5] Ibid. 42.

[6] (1879) 5 Q.B.D. 188.

[7] Ibid. 216.

[8] Ibid. 207.

[9] [1934] 2 K.B. 305.

June 6. Lord Goddard C.J. Devlin J. will give the judgment of the court.

Devlin J. In 1955 the third party, Murphy, was in business, which he describes as that of a mobile greengrocer, and he owned a Bedford utility van which he used in the business and which is the subject-matter of this action. He wanted to buy a Chrysler car from a motor dealer called Coker, but he had no money to pay for it—not even enough for a deposit under a hire-purchase contract, so Coker suggested that he should raise the deposit on the security of the Bedford van by means of a hire-purchase contract on it. If the money was simply borrowed on the security of the van, the necessary instrument would be a bill of sale and would have to be registered as such. But there is nothing to prevent the owner of a vehicle from selling it to a hire-purchase company, pocketing the price and paying it back by instalments; and provided the sale is a genuine one and not a sham, effect will be given to it as a hire-purchase contract. Murphy would then be in a position to buy the Chrysler on hire-purchase terms, using the price of the Bedford to cover the deposit.

Coker was in touch with the plaintiffs, who are a hire-purchase company. The simplest way of carrying out the scheme, so far as it affected the Bedford, would have been for Murphy to have dealt direct with the plaintiffs, but Coker—perhaps because he wanted the deposit for the Chrysler to go straight to him or possibly for some other reason—suggested a different arrangement, and Murphy acquiesced in it. This was, that Coker should pretend to the plaintiffs that he was selling to Murphy the Bedford as well as the Chrysler. This involved also the pretence that Murphy had paid the deposit on both vehicles. Coker would then collect from the plaintiffs the balance of the price of both cars, which would in effect be the money for which he was selling the Chrysler to Murphy; and by paying off the instalments on both cars Murphy would pay the price of the Chrysler. In order to accomplish this plan, Murphy on May 5, 1955, signed in blank four hire-purchase documents—namely, the proposal forms and the memoranda of agreement for the Chrysler and the Bedford respectively. He left these for Coker to fill in. He signed also on the same day a delivery note stating that he had taken delivery of the Bedford.

What happened afterwards is uncertain. Coker, whom the judge has found not to be fraudulent, was not available to give evidence. The records of the plaintiffs were in confusion owing to a change of ownership. The judge has found that the proposal for the Chrysler did not go through. Nevertheless, Coker proceeded with the proposal for the Bedford. He did this without Murphy's authority, for the essence of the scheme was that the Bedford transaction was only ancillary to the purchase of the Chrysler. The judge has found that the plaintiffs accepted the Bedford proposal as a genuine hire-purchase transaction and dealt with it accordingly. On May 10, 1955, the plaintiffs bought the Bedford from Coker, as recorded in a sales note, for £180 less an initial payment of £60. The memorandum of hire-purchase agreement was completed on May 19, and the counterpart signed by the plaintiffs was sent to Murphy the same day. Coker let Murphy have the Chrysler for a bit, but then it was taken away and Coker appears to have told Murphy that the whole transaction was cancelled. Murphy says that he regarded himself as the lawful owner of the Bedford. He advertised his greengrocery business for sale and on June 24, 1955, he sold it, including the Bedford, to the defendant for £200. It is not disputed that the defendant bought in good faith and without any knowledge of Murphy's dealings with the Bedford.

Murphy paid no instalments under the hire-purchase contract. On August 22, 1955, the plaintiffs notified him that they would take possession of the Bedford. Later they ascertained that the defendant had it, and in January, 1956, they claimed it from him. He refused to give it up and they issued proceedings against him in the St. Albans County Court claiming the vehicle or £180 as its value. The defendant joined Murphy as third party. On January 31, 1957, judgment was given for the plaintiffs against the defendant and for the defendant against the third party. The defendant says that his judgment against the third party is worthless, and the plaintiffs have not even bothered to sue him. So the case raises the familiar question of which of two innocent parties, the plaintiffs or the defendant, shall suffer for the misconduct of a third; and it is necessary to determine which of the two is in law entitled to the Bedford van.

The plaintiffs depend for their title upon the transaction with Coker. If Coker had sold the van on behalf of Murphy and with his authority, that would dispose of the matter. So it would if Murphy had actually transferred the property to Coker so as to give him something which he could sell in his own name. But in fact Murphy never transferred the van to Coker; and although he gave a general authorization to Coker to act in the way in which he did, he put, as the judge has found, a specific limitation upon Coker's authority and one which indeed followed from the nature of the transaction contemplated: this was that the two proposals should go forward together. Coker, the judge has found, had no authority to deal with the Bedford separately from the Chrysler. So the plaintiffs cannot claim that they bought the van from the owner or from one who had his actual authority to sell.

But equally it is clear that as against Murphy the plaintiffs acquired a good title to the Bedford. Coker represented that the car was his, and Murphy was privy to that representation being made; so neither can be heard to say that Coker had not a good title to transfer to the plaintiffs. Or, if the matter be looked at as one of principal and agent, the plaintiffs, being ignorant of the limitation placed on Coker's authority, are not affected by it.

The defendant's case is that, although estoppel will prevent both Coker and Murphy from asserting that the property in the Bedford van did not pass to the plaintiffs, it does not prevent anyone else from so doing. The defendant, as an outside party quite ignorant of what Murphy and Coker had done, is, it is submitted, entitled to rely upon the reality of the transaction; and in reality the property never passed from Murphy. The judge finds that Murphy intended to sell the car to Coker if the double transaction had gone through, but that he never in fact did so. The real position is, therefore, that Murphy never sold to Coker and Coker had no title to pass to the plaintiffs.

It is well established that an estoppel cannot affect the reality of the transaction. In *Simm* v. *Anglo-American Telegraph Co.*[1] Brett L.J. puts the principle as follows: "It seems "to me that an estoppel gives no title to that which is the "subject-matter of estoppel. The estoppel assumes that the "reality is contrary to that which the person is estopped from "denying, and the estoppel has no effect at all upon the reality "of the circumstances."

If this is the true principle to be applied in this case, then the plaintiffs never in truth and in fact acquired any title to the Bedford van; and the only question would be whether the defendant, because he acquired the car from Murphy, was bound by the estoppel which prevents Murphy from pleading the truth of the matter. An estoppel affects others besides the representor.

---

[1] (1879) 5 Q.B.D. 188, 206.

The way it has always been put is that the estoppel binds the representor and his privies. But it is not easy to determine exactly who for this purpose is a privy. There can be no doubt that although the representation was actually made by Coker, Murphy on the facts of this case was privy to the making and is bound by it: see *Downs* v. *Cooper*.[2] It would also appear that anyone whose title is obtained from the representor as a volunteer is a privy for this purpose. But it is very doubtful whether a purchaser for value without notice is bound by the estoppel. The point is fully discussed in Ewart on Estoppel by Misrepresentation (1900), pp. 199–203, and the author concludes that a purchaser for value without notice is not bound.

This part of the doctrine of estoppel has been worked out by courts of equity and chiefly in relation to the sale of land. There is no trace of its application to contracts for the sale of goods. Of course, there are many cases of sale of goods where an agent has been held out or represented to have an authority to sell which he has not in fact got, and the solution of the difficulty so created might no doubt have been found by the application of the doctrine of estoppel, but in fact the courts of common law approached the problem of the unauthorized sale from a different angle.

They began with the principle that no one could pass a better title than that which he had: nemo dat quod non habet. To this general principle they admitted a number of exceptions, simply on the ground of mercantile convenience. The best known relate to transfers of currency and negotiable instruments. Sales in market overt afford another example. In these cases, as is well known, a transferee may acquire a better title than that of his transferor. In the same way, and for the same reason of mercantile convenience, the courts of common law allowed a good title to a buyer who bought in good faith from a man who apparently had been given by the true owner the right to dispose of the goods. Such a buyer did not merely acquire a title by estoppel, based on the implied representation by the owner that there was a right of disposition and vulnerable at the suit of anyone who was not bound by that representation. He acquired in the same way as the transferee of a negotiable instrument or the buyer in market overt a good title against all the world.

The doctrine of apparent authority was most clearly laid down by Lord Ellenborough C.J. in *Pickering* v. *Busk*.[3] As we have said, he based it not on estoppel but on mercantile convenience.[4] "Strangers can only look to the acts of the parties, "and to the external indicia of property, and not to the private "communications which may pass between a principal and his "broker: and if a person authorize another to assume the "apparent right of disposing of property in the ordinary course "of trade, it must be presumed that the apparent authority is "the real authority. I cannot subscribe to the doctrine, that "a broker's engagements are necessarily and in all cases limited "to his actual authority, the reality of which is afterwards to be "tried by the fact. It is clear that he may bind his principal "within the limits of the authority with which he has been "apparently clothed by the principal in respect of the subject-"matter; and there would be no safety in mercantile transactions "if he could not."

---

[2] (1841) 2 Q.B. 256.

[3] (1812) 15 East 37.

The case in which this principle was then most commonly applied was that of a factor, the nature of whose position was to be taken as giving him an implied authority to sell goods entrusted to him; he was able to pass a good title to a buyer even if, by reason of a special limitation put by the principal upon his powers, he had no actual authority to do so. But the courts held that, although a factor must be taken to have general authority to sell, it could not be assumed that he had the same authority to pledge; and consequently that, unless he was specially held out as having authority to pledge, he could not, without actual authority, create a valid pledge. It was this ruling which gave rise to the Factors Acts, the first of which was passed in 1823.

All this is expounded by Willes J. in *Fuentes* v. *Montis*,[5] where he refers to: "the class of questions which relate to how "far a person who is not the real owner of goods, but who appears "to the world, or rather to those who deal with him, as owner, "and who deal with him on the faith of his apparent ownership, "should be allowed to confer upon a third person a greater title "than he himself has." He then refers to transfers of currency and negotiable instruments and sales in market overt and continues[6]: "A third case in which a man may convey a better "title to goods than he himself had, and one which is more "apposite to the present, is, where an agent who carries on a "public business deals with the goods in the ordinary course of it, "though he has received secret instructions from his principal

---

[4] 15 East 37, 42.

[5] (1868) L.R. 3 C.P. 268, 276.

[6] Ibid. 277.

"to deal with them contrary to the ordinary course of that trade. "In that case he has what has been sometimes called an apparent "authority, or, as my Brother Byles more accurately calls it, "an ostensible authority, to deal in such a way with the goods as "agents ordinarily deal with them; and, if he deals with them in "the ordinary way of the trade, he binds his principal. These "instances, however, are exceptional to the rule that no man "can give a better title to goods than he has himself, and that "the real owner is not bound except to the extent of an interest "which he has parted with or an authority which he has given. "Now, the result of that state of the law with respect to agents "employed to sell, led to the course of legislation which is known "by the general description of the Factors Acts; because it was "held by the courts of law that the case of a pledge of goods "by a factor intrusted with the possession of goods, and "authorized to sell them, fell within the general rule to which "the instances above enumerated are exceptions, and that it did "not fall within the exceptions by reason of a pledge being an "ordinary and accustomed transaction to be entered into by a "person intrusted as agent to sell, or perhaps more properly by "reason of the courts of law having treated a pledge as being "out of the scope of an authority to sell."

There has been a series of Factors Acts, and the principle of them has been extended also to sellers who are left in possession of goods after the property in them has passed, and buyers who have obtained possession before the property has passed. These situations are covered by sections 8 and 9 of the Factors Act, 1889, and also by section 25 of the Sale of Goods Act, 1893. The legislation which now governs the position of factors, or "mercantile agents," is the Factors Act, 1889, s. 2. There can be no doubt that these sections are based on and supplement the common law, and the language which they employ, which in this respect has been the same from the first, is not the language of estoppel. The Factors Act, 1889, s. 2, for example, states that a sale pledge or other disposition which is within its terms "shall ". . . be as valid as if he was expressly authorized by the owner "of the goods to make the same."

The Factors Acts and the example given by Willes J. in *Fuentes* v. *Montis*[7] apply to an agent who is entrusted with goods. No doubt cases in which the only evidence of apparent authority is the possession of goods must now be treated as being governed by the Factors Acts, which, in this respect, codify as well as amplify the common law; and they do not apply in this case since Coker was not put into possession of the van. But there are other ways besides the possession of the goods in which a man can be clothed with apparent ownership or apparent authority to sell. The common law principle is, as it has always been, wide enough to govern this. This is shown by the early cases on pledges. Because the factor was not held out merely by virtue of his position as having apparent authority to pledge, the doctrine of apparent authority did not apply at common law if nothing more than possession could be shown. It was otherwise if there was other evidence of holding out. Thus, in *Martini* v. *Coles*,[8] Bayley J. said: "A factor has authority to sell, but "not to pledge; and therefore a person who takes a pawn of a "factor takes it at his peril. If the principal does any thing to "induce the person to believe the factor really the principal, "that would be a different case."

---

[7] L.R. 3 C.P. 268, 276.

Similarly, in *Boyson* v. *Coles*[9] the headnote reads: "A factor "cannot pledge, unless the owner of the goods arm him with such "indicia of property as to enable him to deal with it as his own." Abbott J. in particular said[10]: "Possession alone is not a "sufficient emblem of authority to entitle a factor to pledge, "so as to enable the pawnee to hold the goods against the real "owner. In the present case, it does not appear that the "defendant was misled by any act or document with which "the plaintiffs were concerned, other than such as regarded "possession."

In many cases since then this common law principle has been considered concurrently with the Factors Acts; for example, *Vickers* v. *Hertz*[11]; *Johnson* v. *Credit Lyonnais Co.*[12]; *Lowther* v. *Harris*.[13] The apparent ownership or authority has generally taken the form of arming the agent with some indicia which made it appear that he was either the owner or had the right to sell. But in our judgment the principle applies to any form of representation or holding out of apparent ownership or the right to sell. It is embodied in section 21 (1) of the Sale of Goods Act, which provides: "Where goods are sold by a person "who is not the owner thereof, and who does not sell them under "the authority or with the consent of the owner, the buyer "acquires no better title to the goods than the seller had, unless

---

[8] (1813) 1 M. & S. 140, 150.
[9] (1817) 6 M. & S. 14.
[10] Ibid. 27.
[11] (1871) L.R. 2 Sc. & Div. 113.
[12] (1877) 3 C.P.D. 32.
[13] [1927] 1 K.B. 393; 43 T.L.R. 24.

" the owner of the goods is by his conduct precluded from denying " the seller's authority to sell."

This section expresses the old principle that apparent authority to sell is an exception to the maxim nemo dat quod non habet; and it is plain from the wording that if the owner of the goods is precluded from denying authority, the buyer will in fact acquire a better title than the seller.

We doubt whether this principle, which is sometimes referred to—for example, by Wright J. in *Lowther* v. *Harris* [13]—as common law estoppel, ought really to be regarded as part of the law of estoppel. At any rate it differs from what is sometimes called " equitable estoppel " in this vital respect, that the effect of its application is to transfer a real title and not merely a metaphorical title by estoppel. It is unnecessary to determine in this case whether it covers the exercise of every sort of apparent authority in relation to the sale of goods or whether it is confined to apparent authority to sell. In *Simm* v. *Anglo-American Telegraph Co.*[14] both Brett and Cotton L.JJ. in the course of their judgments referred by way of analogy to the sale of goods. Cotton L.J.[15] seems to consider that a good title might be given to goods if the seller was in relation to an act of appropriation estopped from denying that the property had passed. It looks from Brett L.J.'s judgment [16] as if he might have taken a different view. But that case was not in fact concerned with an agent's authority to transfer. It related to a transfer of shares which had been attempted by a forged instrument and the question was whether the company which had registered the transferee as the owner of the shares and issued a certificate accordingly was stopped from denying his title.

It is sufficient to say that, whatever the limits of the doctrine, it clearly applies to the facts of this case. Coker was armed by Murphy with documents which enabled him to represent to the plaintiffs that he was the owner of the Bedford car and had the right to sell it. The result is that Murphy is, in the words of section 21, precluded from denying Coker's authority to sell, and consequently the plaintiffs acquired the title to the goods which Murphy himself had and Murphy had no title left to pass to the defendant.

Two other defences have been raised to the plaintiffs' claim. The first is an application of section 25 of the Sale of Goods Act, to which we have already referred and which reads as follows:

[13] [1927] 1 K.B. 393.
[14] 5 Q.B.D. 188.
[15] Ibid. 216.
[16] Ibid. 207.

"Where a person, having sold goods, continues or is in possession of the goods . . . the delivery or transfer by that person . . . of the goods . . . to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same." This plea seeks in effect to turn the tables on the plaintiffs; treating them as the owners of the goods, it is said that by leaving Murphy in possession of the van they enabled him to make an effective sale to the defendant. An inquiry into this defence shows that it involves a consideration of the Hire Purchase Act, 1938, and it is convenient to consider first of all the remaining defence which is based more directly on the provisions of that Act. Section 2 of the Act lays down certain requirements which have to be complied with, and provides that if they are not, the hire-purchase company will not be entitled to enforce the agreement or to any right to recover the goods from the hirer. One of these requirements is that "a note or memorandum of the agreement is made and signed by the hirer and by or on behalf of all other parties to the agreement." It is contended that this requirement was not complied with because the form was signed by Murphy in blank. It is submitted that what has to be signed is not a bit of blank paper but something which is at the time of the signature a note or memorandum of the agreement. It is pointed out that, whereas the other parties to the agreement are expressly allowed to sign by an agent, the hirer is not; and a fortiori therefore could not authorize an agent to fill in the agreement for him. In our judgment this submission is right. The wording of the Act suggests that the note or memorandum must be made before it is signed; and a consideration of the object of the Act supports the literal construction, for the object of the provision must be that the hirer should know and understand what he is agreeing to.

The hire-purchase agreement is therefore unenforceable as between the plaintiffs and Murphy. But the plaintiffs' rights against the defendant do not depend upon the hire-purchase agreement. They depend upon the fact that they are the owners of the goods and thus entitled to possession of them; and they acquired that ownership from the sales agreement with Coker and not under the hire-purchase agreement. The defendant relies not on unenforceability but on those sections of the Act that deal with recovery of possession. These consist of the provision in section 2 (2) that the owner shall not be entitled to enforce "any right to recover the goods from the hirer"; and also section 17, which provides: "If, whilst by virtue of this Act the enforcement by an owner of a right to recover possession of goods from a hirer is subject to any restriction, the hirer refuses to give up possession of the goods to the owner, the hirer shall not, by reason only of the refusal, be liable to the owner for conversion of the goods."

These provisions contemplate that the hirer may enjoy the possession of the property without having to pay for it. No doubt, as Mr. Phillips submitted, it is the intention of the Act that a hire-purchase company shall be penalized for failing to see that a proper memorandum is made. But is it the intention that a hirer who discovers a flaw in the agreement should be able to turn his property into cash and pocket the cash without handing any of it over to the hire-purchase company? The only way of finding out how far the Act intends to go is to consider the words it uses, giving full weight to each and bearing in mind that rights of property are not to be taken away except expresssly or by clear implication. Section 2 (2) provides that the owner is deprived of "any right to recover the goods from the hirer." It does not say that he is deprived of his right to recover the goods from anyone else, and in our judgment is not to be construed as meaning that. Section 2 (2) deals only with the right to recover. It does not deal with damages for detinue or conversion; and if it stood alone it might well be that the owner, while he could not recover the goods from the hirer, could exercise his right to possession to the extent of obtaining damages for detinue or for conversion. Section 17 covers a possible claim of this sort: the hirer is not to be liable for conversion by reason only of his refusal to give up possession. This suggests that he would be liable for conversion if some other reason for liability could be asserted as, for example, his parting with possession to a third party. Whether this is so or not, it is clear that neither section 2 nor section 17 takes away from the owner any rights which he has against persons other than the hirer. It follows therefore that the defence under the Act fails.

We turn back to consider the position under the Sale of Goods Act, s. 25. It can certainly be argued that for the purposes of this section Murphy was the seller of the van; and undoubtedly he continued in possession of it after the sale. It is true that he was not the seller in truth; but then in truth there was no sale. But he was the person who, because he could not dispute the sale, was divested of his title which in fact passed to the plaintiffs. Does this make him the seller for the purposes of section 25? The title passed because as owner he was, in the words of section 21, "by his conduct precluded from denying the "seller's authority." But that means that for the purposes of section 21 Coker is the seller; and it may be said that he ought therefore to be treated as the seller for the purposes of section 25.

This argument raises difficult considerations, and we prefer to deal with the point in another way and upon the assumption that Murphy was the seller within the meaning of section 25. It has been held that section 25 does not apply unless the seller remains in possession as seller. In particular, section 25 does not apply to a person who, having sold a vehicle to a hire-purchase company, buys it back under a hire-purchase agreement: see *Staffordshire Motor Guarantee Ltd.* v. *British Wagon Co. Ltd.*[17] This is because the character of the possession has changed. On the assumption that Murphy must be deemed through Coker to have sold the Bedford van to the plaintiffs and then entered into a hire-purchase agreement with them, this authority seems to fit the case. Although the possession never passed physically away from Murphy, its character was changed from that of seller to bailee and so the section would not apply.

But in the *Staffordshire* case [17] there was a valid hire-purchase agreement. How is the present case affected by the fact that the hire-purchase agreement is unenforceable? If the Act said that it was void, then of course the character of Murphy's possession could not be altered by it. But the Act says merely that it is to be unenforceable. This must mean that it is effective to alter the rights of the parties but that the altered rights cannot be enforced. This construction of the word is similar to that which has been given to the term "not enforceable by action" in section 4 of the Sale of Goods Act: see *Taylor* v. *Great Eastern Railway Co.*,[18] *per* Bigham J. On this ground the case under section 25 fails.

We therefore dismiss the appeal and affirm the judgment. It is very hard on the defendant, who is clearly in a small way of business and appears to have bought the vehicle out of his Post Office savings. But his fate is, unfortunately, a common one where hire-purchase agreements are concerned and is now one of the regular ways in which unsuspecting buyers are deceived by what they take to be ownership. It is a little ironic that

---

[17] [1934] 2 K.B. 305.

[18] [1901] 1 K.B. 774; 17 T.L.R. 394.

C. A.

1957

Eastern Distributors Ltd.
v.
Goldring
Murphy.
Third
Party.

the hire-purchase company should succeed in this case by reliance on the protection which the common law gives to those who deal with apparent owners, but which unhappily is not available to the defendant in this case.

Appeals dismissed.

Solicitors: *Giffen, Couch & Gilmore for Giffen & Couch, St. Albans; A. Russell Jones & Co., Hatfield; Carr, Sandelson & Co.*

ADDISCOMBE GARDEN ESTATES LTD. AND ANOTHER v. CRABBE AND OTHERS.

1957
Apr. 10, 11.

Hilbery J.

[1956 A. No. 918.]

Landlord and Tenant—Business premises (security of tenure)—"Business"—Members' club—"Any activity carried on by a body "of persons, whether corporate or unincorporate"—Lawn tennis club occupying clubhouse and tennis courts under tenancy agreement—Club registered under Industrial and Provident Societies Act, 1893, *to carry on business of lawn tennis club—Whether business tenancy—Landlord and Tenant Act,* 1954 (2 & 3 *Eliz.* 2, *c.* 56), *Part II, s.* 23 (2).

By section 23 (1) of Part II of the Landlord and Tenant Act, 1954, security of tenure is given (in certain circumstances) to any tenancy "where the property comprised in the tenancy is or "includes premises which are occupied by the tenant and are so "occupied for the purposes of a business carried on by him. . . ." By section 23 (2) "the expression 'business' includes a trade, "profession or employment and includes any activity carried on "by a body of persons, whether corporate or unincorporate."

The trustees of a members' lawn tennis club registered under the Industrial and Provident Societies Act, 1893, and which, by its rules, carried on the business of a lawn tennis club, entered into an agreement with the owners of tennis courts and clubhouse, whereby the owners purported to license and authorize the trustees to use and enjoy the premises for two years from May 1, 1954, in consideration of monthly payments of "court fees." The agreement expired on May 1, 1956, but thereafter the trustees continued to occupy and use the premises, asserting that the agreement granted them a tenancy which was protected by Part II of the Act of 1954.

On a claim by the owners for an injunction to restrain the trustees from trespassing and for an order to quit and yield up the premises:—

Held, (1) that the agreement must be construed as a tenancy agreement.

(2) That there was no justification for limiting the words "any "activity" in section 23 (2) of the Act of 1954 by making them read "any such activity," and, as the club was a corporate body which by its rules carried on on the premises the activity of a lawn tennis club, that was an activity within the meaning of the subsection and therefore the tenancy which the trustees held under the agreement was protected by Part II of the Act.

Hills (Patents) Ltd. v. *University College Hospital Board of Governors* [1956] 1 Q.B. 90, 99; [1955] 3 All E.R. 365 considered.

ACTION.

The Shirley Park Lawn Tennis Club Ltd. was a society registered under the Industrial and Provident Societies Act, 1893. Rule 1 of the rules of this tennis club provided that "The society "(hereinafter called the 'the club') shall be called the Shirley "Park Lawn Tennis Club Ltd.; and its objects are to carry on "the business of a lawn tennis club."

Under an agreement in writing made on April 12, 1954, the plaintiff company, Addiscombe Garden Estates Ltd., owners of the Shirley Park Hotel and tennis courts and clubhouse situated in the hotel grounds, purported to "license and authorize" the defendants, Stuart Brooksby Crabbe, Leonard Oswald Crake and Ronald Walter Arthur Fowler, trustees of the Shirley Park Lawn Tennis Club, to enter upon, use and enjoy the clubhouse and tennis courts and to use certain chattels, including nets and equipment, in consideration of court fees of £37 10s. to be paid monthly "to the hotel." The agreement, which was for a fixed period of two years from May 1, 1954, contained a number of clauses providing, inter alia, that the defendants should repair and maintain the premises "in good tenantable repair and "condition" and render them up at the expiry of the term in such condition; permit the plaintiff company and their agents "at all reasonable times to enter the premises to inspect their "condition and for all other reasonable purposes." The plaintiff company on its part agreed, inter alia, that the defendants should "quietly enjoy" the premises without interruption. After the expiry of the agreement the defendants and members of the club continued to use the premises, although no further agreement was concluded between the parties.

In this action the plaintiff company and the second-named plaintiff, Alan Percy Smith, who had bought the property from the plaintiff company on August 1, 1956, alleged that the defendants and those members of the club who had used the premises after May 1, 1956, had done so without any licence and authority and were trespassers; and that their failure to remove from the premises amounted to a wrongful dispossession of the plaintiff company from May 1, 1956, and of the second-named plaintiff from August 1, 1956.

They accordingly sought (1) an injunction restraining the defendants from trespassing in or upon the premises; (2) an order to quit and yield up the premises to the second-named plaintiff; (3) an order for delivery up of the premises; and (4) damages.

The defendants contended that the agreement of April 12, 1954, on its proper construction, granted them a tenancy which was subject to Part II of the Landlord and Tenant Act, 1954; that no notice to terminate the tenancy had been served in accordance with that Act, and that accordingly the tenancy continued in force. By an amendment to the defence made at the trial, which was not objected to by the plaintiffs, it was stated that the club was a society registered under the Industrial and Provident Societies Act, 1893, under the name of the Shirley Park Lawn Tennis Club Ltd., and that the defendants were trustees of that society.

On the question of construction Hilbery J. held that the agreement of April 12, 1954, must be construed as a tenancy agreement and not as a licence. The case is reported only on the question whether the tenancy was protected by Part II of the Landlord and Tenant Act, 1954.[1]

Charles Fletcher Cooke for the defendants. The defendants, as trustees of the Shirley Park Lawn Tennis Club Ltd., are business tenants within the meaning of the term "business" in section 23 (2) of the Landlord and Tenant Act, 1954. The term is there used in the widest possible sense and includes not only a trade, profession or employment but "any activity carried "on by a body of persons, whether corporate or unincorporate." In *Hills (Patents) Ltd.* v. *University College Hospital Board of Governors*[2] it was assumed that where premises were required to be used for hospital purposes they were to be used for business purposes. It appears, therefore, to be unnecessary to show any element of trading or profit-making in order to constitute a business. It suffices for the purposes of section 23 (2) if there is an "activity" carried on by a body of persons.

---

[1] Landlord and Tenant Act, 1954, Part II. "Security of tenure for "business, professional and other "tenants." S. 23: "(1) Subject to "the provisions of this Act, this Part "of this Act applies to any tenancy "where the property comprised in the "tenancy is or includes premises "which are occupied by the tenant "and are so occupied for the purposes "of a business carried on by him . . . "(2) In this Part of this Act the "expression 'business' includes a "trade, profession or employment "and includes any activity carried on "by a body of persons, whether "corporate or unincorporate. . . ."

[2] [1956] 1 Q.B. 90.

In the present case the defendants occupy the premises as trustees of a lawn tennis club which is in fact a corporate body; it is registered as a society under the Industrial and Provident Societies Act, 1893. It could not be so registered unless it carried on a business and, as appears from its rules, it carries on the business of a lawn tennis club. That is an activity which is clearly included within the words of section 23 (2), and therefore the defendants are entitled to security of tenure.

Lionel Blundell for the plaintiffs. A lawn tennis club is not a business within the meaning of section 23 (2) and the defendants are not entitled to the protection of Part II of the Act. The word "business" is not defined in the Act and therefore it must be assumed that the legislature is using the word in the sense in which it is generally understood. The interpretation given to the word "business" by common usage and in decided cases is something which occupies a man's time by way of occupation or calling. *Hills (Patents) Ltd.* v. *University College Hospital Board of Governors*[2] is not of assistance, because no argument was there addressed to the court on the question whether the activity carried on was a business or not. It was assumed that it was, the whole argument being whether the premises were required for the occupation of the Hospital Board or the Minister of Health. Even had the question been raised, it would have been difficult to argue that the purposes for which the premises were required was not a business.

On the question of construction, it may be that the words of section 23 (2) are wide enough to cover any activity whatsoever if carried on by a body of persons, but such a construction would lead to absurdities. It is submitted that the key to the proper construction of the subsection are the words "includes a trade, "profession or employment," which are intended to remove doubts, if there be any, as to the kind of activities contemplated by the subsection. The words of the subsection do not strictly admit the ejusdem generis rule, but the principle of the rule should be applied and the word "activity" should be construed as "such activity" in order to avoid the absurdities which would otherwise result. If the meaning of the word "activity" is not so limited, it means that all sorts of strange activities would, if carried on by a group of persons, become protected by Part II of the Act, whereas the intention of that Part of the Act is to deal with business activities. Parliament could not have intended the section to be so widely interpreted as to include a lawn tennis club, and the defendants should not be entitled to protection.

---

[2] [1956] 1 Q.B. 90.

HILBERY J. stated the facts, considered the terms of the agreement and held that they were only consistent with the grant of exclusive possession to the defendants, and therefore, applying the principle laid down in *Facchini* v. *Bryson*,[1] the agreement must be construed as a tenancy agreement and not as a licence. His Lordship continued: The next point that arises is whether, if it is a tenancy agreement, this club carries on a "business" within the meaning of Part II of the Landlord and Tenant Act, 1954. That part of the Act provides for "Security of tenure for business, "professional and other tenants." Section 23 is in the following terms: [His Lordship read section 23 (1) and (2) and continued:] The Shirley Park Lawn Tennis Club Ltd. is a society registered under the Industrial and Provident Societies Act, 1893. By section 4 of that Act: "A society which may be registered under "this Act (herein called an industrial and provident society) is "a society for carrying on any industries, businesses, or trades "specified in or authorized by its rules, whether wholesale or "retail, and including dealings of any description with land." Rule 1 of this tennis club provides that "The society (hereinafter "called 'the club') shall be called the Shirley Park Lawn Tennis "Club Ltd.; and its objects are to carry on the business of a lawn "tennis club." None of us would, in the ordinary way, think of a members' tennis club or a golf club as carrying on a business. There may be—as there often is—a professional shop where trade is actually done, but we should not in ordinary circumstances think of the club's activity as the carrying on of a business. But I have to decide whether this is a "business" which is to be included in the word "business" by the terms of section 23 (2) of the Landlord and Tenant Act, 1954. That subsection states in express terms that the expression "business" includes a trade, profession or employment, and includes any activity carried on by a body of persons, whether corporate or unincorporate. Mr. Blundell has argued: True, the wording of the subsection does not permit of the application of the ejusdem generis rule:

---

[1] [1952] 1 T.L.R. 1386.

it is not really a section of definition: it is a section which states that for the purposes of considering what is a business in respect of which this part of the Act gives security of tenure one must include in the word " business " " a trade, profession or employ-" ment," and " any activity carried on by a body of persons, " whether corporate or unincorporate." He asks me to say that, since the word " business " is put in inverted commas, it indicates that it is a word to be applied in the sense in which it would ordinarily be used in everyday life, and that all that is enacted by the subsection is that one should, in using it in that way, include a trade, profession or employment and any activity of the same kind as would ordinarily be included in the word " business." But I find myself unable to give that construction to the subsection. All that need have been said if it were intended to be read that way was, " The expression ' business ' includes " a trade, profession or employment and includes any such " activity carried on by a body of persons." But Parliament has refrained from putting in the word " such " or, at any rate, has not put it in; and I am left with the words " includes any activity " carried on . . ."

I cannot overlook the fact that Denning L.J., in *Hills (Patents) Ltd.* v. *University College Hospital Board of Governors*,[2] holding that the governors of a hospital under the National Health Service Act, 1946, carried on a " business " within the meaning of this very subsection, said this[3]: " ' . . . " ' the expresssion " business " includes a trade, profession or " ' employment and includes any activity carried on by a body " ' of persons, whether corporate or unincorporate.' Reading " those words into the section it seems to me plain that the " governors intend to occupy these premises for the purposes of " an activity to be carried on by them therein. Their activity is " managing this hospital, and they intend, if they get these " premises, to occupy them for the purpose of that activity." Nobody in the ordinary sense would say that a hospital carries on a business; but none the less the Court of Appeal have said that the governors of it are engaged in an activity as a corporate body and therefore are carrying on a business within the meaning of section 23 (2).

I am unable to avoid the conclusion that the words " and " includes any activity carried on by a body of persons, whether " corporate or unincorporate," are sufficient to cover the activity carried on by this body corporate, the Shirley Park Lawn Tennis Club Ltd. It is an "activity"; it is "carried on by a body "corporate"; and it is an activity carried on by that body corporate on these premises. I cannot find any justification for limiting the words "any activity" by inserting the word "such" between the words "any" and "activity" so as to make it read "any such activity." Therefore I find that the plaintiffs' claim here must fail.

---

[2] [1956] 1 Q.B. 90; [1955] 3 All E.R. 365.

[3] [1956] 1 Q.B. 90, 99.

I can only say that I hope that some other court will have the opportunity to consider this matter.

Judgment for the defendants.

Solicitors: *Summer & Co.; Currey & Co.*

E. M. W.

BROWN JENKINSON & CO. LTD. v. PERCY DALTON (LONDON) LTD.

[Plaint No. M. 1189.]

C. A.

1957
May 16, 17;
July 3.

Lord Evershed M.R., Morris and Pearce L.JJ.

Shipping—Bill of lading—Indemnity for clean bill—Goods "shipped "in apparent good order and condition"—Statement false to knowledge of shipowner—Indemnity taken—Whether enforceable. Contract—Illegality.

The defendants had a quantity of orange juice which they wished to ship to Hamburg. The plaintiffs, as agents of the owners of the vessel on which the orange juice was to be shipped, informed the defendants that the barrels containing the orange juice were old and frail and that some were leaking and that a claused bill of lading should be granted. The defendants required a clean bill of lading, and the shipowners, at the defendants' request and on a promise that the defendants would give to them an indemnity, signed bills of lading stating that the barrels were "shipped in "apparent good order and condition." The defendants, pursuant to their promise, entered into an indemnity whereby they undertook unconditionally to indemnify the master and the owners of the vessel against all losses which might arise from the issue of clean bills of lading in respect of the goods. The barrels, when delivered at Hamburg, were leaking and the shipowners had to make good the loss. The plaintiffs sued the defendants under the indemnity, the benefit of which had been assigned to them. The defendants refused to pay, alleging that the contract of indemnity was illegal, because it had as its object the making by the shipowners of a fraudulent misrepresentation. It was found that the shipowners did not desire or intend that anyone should be defrauded. It appeared from the evidence that the granting of clean bills of lading against indemnities was a common practice:—

Held (Lord Evershed M.R. dissenting), that the shipowners by making in the bill of lading a representation of fact that they knew to be false with intent that it should be acted upon were committing the tort of deceit, and that the defendants' promise to indemnify the shipowners against loss resulting from the making of that representation was accordingly unenforceable.

Silver v. *Ocean Steamship Co. Ltd.* [1930] 1 K.B. 416; 46 T.L.R. 78 applied.

Per Lord Evershed M.R. There was no ground for holding on the facts found and proved that it was the aim or purpose of the plaintiffs in making out a clean bill of lading to cheat or defraud anyone, and in the absence of a finding of dishonesty against the plaintiffs it ought not to be held that the defendants established their allegation that the consideration for the indemnity was that the plaintiffs should make a fraudulent misrepresentation of the condition of the goods or that there was a contract unenforceable by the plaintiffs. The case was not one in which the court, on grounds of public policy, was required to deny the plaintiffs their right to sue.

Appeal from Judge Block sitting at the Mayor's and City of London Court.

The plaintiffs, Brown Jenkinson & Co. Ltd., were chartering agents for the owners of *M.V. Titania* and in this action sued the defendants, Percy Dalton (London) Ltd., on a covenant of indemnity. The following statement of facts is substantially taken from the judgment of Morris L.J.

The defendants had bought from one George Dawson certain barrels of orange juice which had previously been owned by the Ministry of Food. The defendants' managing director had a farm in Kent, and the barrels of orange juice were taken there. As the managing director knew, and as could be seen, the barrels were pretty old and weather worn, and some were leaking. The barrels were seen at the farm by the representative (Mr. Visser) of Vipa Internationale Handelsonderneming of Rotterdam (hereinafter referred to as "Vipa"). Vipa bought the 100 barrels which formed the shipment in question in this case. So far as material, the terms of the contract were that the goods were to be put on board ship in London after Vipa had given shipping instructions to the defendants and that payment to the defendants was to be in net cash in Rotterdam, against the presentation of documents to Vipa's bank in Rotterdam. The documents were to include two original bills of lading and a weight certificate

C. A.
1957

BROWN JENKINSON & CO. LTD. v. PERCY DALTON (LONDON) LTD.

issued in the name of Vipa-Rotterdam. Insurance cover was to be arranged by Vipa. Vipa later gave shipping instructions to the defendants and asked the defendants to pay the freight on their behalf: they wished to have clean bills of lading, and so informed the defendants. It was pursuant to these arrangements that the defendants communicated with the plaintiffs and wrote a letter of March 28, 1956. Save as revealed by that letter, the arrangements between the defendants and Vipa were not known to the plaintiffs. Vipa resold the 100 barrels to Firma Julius Mertens of Hamburg (hereinafter referred to as "Mertens"). The sale was c.i.f. Hamburg: payment was to be in cash against documents at first presentation in Hamburg.

The plaintiffs acted as loading brokers and chartering agents for certain shipping lines, including the Hamburg-London Linie. The defendants, wishing to ship the orange juice to Hamburg on the *M.V. Titania*, one of the ships of that line, communicated with the plaintiffs. Following a telephone conversation, they wrote to the plaintiffs on March 28, 1956: "We would confirm "our telephone conversation of today and detail hereunder speci-"fication and our requirements: 1. Consignment: 100 barrels "concentrated orange juice—mark 'V.' 2. Weight: We are "having these barrels weighed before delivery into the wharf, "and shall instruct our driver to give you the weight as soon "as this is done. 3. Consignee: Unto 'Order' yourselves as "agents for the shipper." Then, 4 was as to the bills of lading. One bill was to be returned to the defendants, and one non-negotiable copy was to go forward in ship's bag. "Bills to be "marked 'notify Vipa Internationale Handelsonderneming'" at an address in Rotterdam, "stamped freight paid, as we shall pay "freight here in London. We also require clean on board bills "of lading." Then: "5. Charges to f.o.b. and freight will be "paid by us." Then, under 6, it was said that the value was approximately £1,000.

The defendants stipulated that they would require clean on board bills of lading. Thereafter the defendants sent 100 barrels to the docks. The representative of the cargo superintendents, who acted for the plaintiffs in superintending the loading of the ship, saw the barrels on their arrival at the docks. They were old and leaking: liquid was seeping between the seams. The tally clerk described the casks on his tally card as being "old "and frail" and he recorded that some were leaking. The barrels were clearly not in good condition. The plaintiffs informed the defendants of the state of the barrels. The facts of the situation required that claused bills of lading should be issued. But the defendants required clean bills of lading and accordingly the plaintiffs, acting on behalf of the master of the ship, signed bills of lading recording that the 100 barrels were "shipped in apparent good order and condition." The plaintiffs were only prepared to issue such bills if they had the promise of the defendants to indemnify "the master, vessel, the owners "or their representatives" against all losses or damage which might arise from the issue of clean bills of lading. The defendants gave such an indemnity in the following terms: "We "the undersigned hereby certify that we are aware that in "connexion with the undermentioned goods, viz., 100 barrels "concentrated orange juice mark 'V,' shipped on April 4, "1956, per *M.V. Titania* on bill of lading no. 5 at London and "destined for Hamburg the following has been noted at time of "shipment: old and frail containers in leaking condition. 2. With "a view, however, to avoid any misunderstanding with the third "parties we request that no mention be made of the above in the "bills of lading covering these goods." Paragraph II: "On the "other hand, we herewith undertake unconditionally and irrevocably to indemnify the master, the vessel, the owners or their "representatives against all losses or damages of any nature "whatsoever which might arise from the issuance of clean bills "of lading for the said goods. III. We do hereby irrevocably "authorize the said master, vessel, the owners and their representatives, in the event of third parties bringing forward any "claims against them, to make any arrangements with said "parties for our account, which said master, shipowners or "representatives may deem advisable. IV. Finally we the "undersigned declare that we give our unqualified consent to a "copy of this document being issued, if required, to receivers, "underwriters and other persons, who, in the opinion of the "master, shipowners or their representatives, may directly or "indirectly be concerned." That document was signed on behalf of the defendants on April 4. It was on this contract that the claim of the plaintiffs was brought. The indemnity was given to the shipowners but they had assigned the benefit of it and the right to enforce it to the plaintiffs. The plaintiffs could not be in any better position so far as concerned the defences raised than the shipowners.

The director of the plaintiffs, a Mr. Broome, gave evidence on their behalf. The following passages from his cross-examination were cited by Morris L.J. "(Q) It does not require a tremendous “amount of skill to know whether a barrel is leaking or not, does it? (A) No. (Q) And will you once again agree with me —because I do not want to lose this point—that if barrels are leaking they cannot be in apparent good order and condition? (A) Yes. (Q) Let us now take the purpose of a bill of lading. So far you have told his Lordship that you are prepared to do this—that is, to make a false bill of lading—in order to assist the shippers? (A) Yes. (Q) Will you agree with me, however, that a bill of lading, to use my friend's own words, is a ‘negotiable document’? (A) Yes. (Q) And it may either find itself in the hands of the original purchaser or anybody else to whom the bill is endorsed? (A) Yes.” . . . “(Q) Do not answer if you are not prepared to, because it is largely a question of law, but do you know, in fact, that the words ‘in apparent good order and condition’ by owners is a representation to the person who ultimately gets hold of the bill that the goods are in that condition? (A) I prefer to say that is a legal point. (Q) Then we will leave out the legal point and put it as a question of fact, because in due course I shall be able to show his Lordship the authorities on that. You know perfectly well that persons who get hold of the bill of lading, either as the original purchasers or as purchasers who have subsequently repurchased, are entitled to look to the bill of lading to see if it is a clean one or a dirty one, a claused one? (A) Yes. (Q) Again without going into any legal considerations, you know that whether or not a bill of lading is clean or claused is a matter of importance to persons dealing in the goods? (A) Yes, I agree with that.”

“(Q) We know from this correspondence that Vipa's bank— Vipa being the purchaser—was Slavenburgs? (A) That was mentioned, yes. (Q) I am suggesting to you that the person who puts up the money (the banker) is very often only prepared to put up money if, in fact, the goods are shipped with a bill of lading which is clean, and is not prepared to put up the money if there is a claused bill of lading? (A) That is the reason shippers ask us to issue clean bills of lading in exchange for an indemnity. (Q) I am very satisfied with that answer. You agree that bankers will not put up the money where there is a claused bill of lading, and that is the reason, you say, why shippers ask for a clean bill, which you give them as against an undertaking of indemnity? (A) Yes.” The judge: “Is this about right: You know that bankers are apt not to advance money except on clean bills, and that is the reason you are

C. A.
1957

Brown Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd.

"asked to give clean bills against an indemnity? (A) Yes." Counsel: "And for that reason you accede to the request so as "to assist the shippers, if I may finish it off? (A) Yes."

". . . You intended to disclose on this negotiable instrument, "the bill of lading, that the containers were old and frail? "(A) Yes. (Q) Please do not think me unnecessarily offensive, "but you were prepared to make the bill of lading false by not "clausing it in that way, but by allowing it to read 'in apparent "'good order and condition' providing you received a letter of "indemnity from the shippers? (A) We were prepared to issue "a clean bill of lading providing we got a letter of indemnity from "the shippers, yes. (Q) You were prepared, were you not, to "issue a document which you knew to be false, because it did "not have the clausing and it just had the words 'in apparent "'good order and condition'? (A) Yes. (Q) And that you knew "at the time to be false? (A) Yes, you are right. (Q) Again "look at a letter of July 5 from your company, and again signed "by you? (A) Yes. (Q) In the second paragraph you will see: "'. . . in order to cover the owners we had to inform you that "'it was necessary to clause the bills of lading, unless you "'were prepared to give us an indemnity'? (A) Yes. (Q) 'We "'informed you fully of the state of the consignment at the time "'of shipment, and naturally in order to cover the owners we "'had to inform you that it was necessary to clause the bills "'of lading, unless you'—that is the shippers—'were prepared "'to give us an indemnity.' Is that right? (A) Yes."

The owners had to pay compensation amounting to £147 to the receivers of the orange juice or their underwriters. They assigned the benefit of the indemnity to the plaintiffs who claimed in this action to recover under the indemnity that sum from the defendants.

Judge Block gave judgment for the plaintiffs. The defendants appealed.

T. G. Roche Q.C. and *T. M. Eastham* for the defendants. An agreement to make a fraudulent misrepresentation is never actionable. The statement in these bills of lading was a representation made to all persons into whose hands they might come. The judge did not find fraud in this case. He found that no person had suffered damage as a result of the misrepresentation. That is not so; damage was in fact suffered. But it is irrelevant. What is illegal is the agreement to commit a fraud. All the elements which make up fraud were present. What was illegal was to make an agreement to defraud: *Scott* v. *Brown, Doering, McNab & Co.*[1] [Reference was also made to *Holman* v. *Johnson*[2]; *Pearce* v. *Brooks*[3]; *Moralice (London) Ltd.* v. *Man*[4]; *United Baltic Corporation Ltd.* v. *Dundee, Perth and London Shipping Co. Ltd.*[5]; *Ben Line Steamers Ltd.* v. *Heureux (London) Ltd.*[6]; *The Tromp*[7]; *Dent* v. *Glen Line Ltd.*,[8] and *Silver* v. *Ocean Steamship Co. Ltd.*[9]]

The general principle established by the authorities is that any contract, the consideration for which is illegal, is unenforceable. The consideration for this indemnity was the issuing of bills of lading which stated that the barrels were shipped in good order and condition. That was a misrepresentation which was false to the knowledge of the shippers and it was made with the intention of inducing third parties to act on it to their detriment. That is sufficient to establish fraud. The fact that the judge found that it is a common practice to issue clean bills of lading against covenants of indemnity is not material. Nor is it material whether any person suffered damage or not.

Eustace Roskill Q.C. and *B. J. Brooke-Smith* for the plaintiffs. The decision of the judge was right. The practice of issuing bills of lading which contain false statements has frequently been said to be reprehensible. It is, however, a practice of many years' standing. There was nothing illegal in what was done in this case. It is primarily a question of public policy. Parties who make contracts should be held to them and should not be allowed to escape by alleging some unknown rule of public policy: *Printing and Numerical Registering Co.* v. *Sampson.*[10] The point taken by the defendants has never been taken before, although it has been open for many years. The court is asked to consider whether there is any rule of public policy which prevents the plaintiffs suing on this indemnity. The allegation that there was here a conspiracy to defraud is challenged. It is not contrary to public policy to issue a bill of lading with inaccurate statements in it. There is a distinction between doing an act prohibited by statute and an act prohibited at common law.

What the shipowners did they did at the request of the defendants, and they acted in accordance with a well-established practice. These shipowners were not parties with the defendants to any conspiracy. Nothing less than establishing a conspiracy to defraud will relieve the defendants from honouring their bond. On the facts, there was no agreement between the shipowners and the defendants to commit a tort.

---

[1] [1892] 2 Q.B. 724; 8 T.L.R. 755.
[2] (1775) 1 Cowp. 341.
[3] (1866) L.R. 1 Ex. 213.
[4] [1954] 2 Lloyd's Rep. 526.
[5] (1928) 32 Ll.L.Rep. 272.
[6] (1935) 52 Ll.L.Rep. 27.
[7] [1921] P. 337; 37 T.L.R. 752.
[8] (1940) 45 Com.Cas. 244; 67 Ll.L.Rep. 73.
[9] [1930] 1 K.B. 416; 46 T.L.R. 78.
[10] (1875) L.R. 19 Eq. 462.

The principles with regard to illegal contracts are that (1) a contract entered into with the object of committing an illegal act is unenforceable; (2) the court will not enforce a contract expressly or impliedly forbidden by statute. The latter does not apply in this case. Before (1) can apply, the question arises of the intention of the party seeking to enforce the contract at the date when it was made. If there was then a mutual intention to commit a tort, the contract is unenforceable. If, however, only one party had that intention, the other can enforce it. Unless there was an intention to defraud, the contract is enforceable: *St. John Shipping Corporation* v. *Joseph Rank Ltd.*[11]; *Burrows* v. *Rhodes.*[12]

The decision in *Tinline* v. *White Cross Insurance Association Ltd.*[13] shows that the court is reluctant to extend the doctrine of public policy so as to bar claims to an indemnity. The indemnity here covers both liability in contract and tort. There is nothing in the judgment which suggests that the judge considered that there was any intention to defraud. Without such a harmful intention being proved, the allegation of conspiracy also fails: Winfield on Torts, 6th ed., p. 530; *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch.*[14] [Reference was also made to *United Baltic Corporation Ltd.* v. *Dundee, Perth and London Shipping Co. Ltd.*,[15] *Ben Line Steamers Ltd.* v. *Heureux (London) Ltd.*[16] and *Dent* v. *Glen Line Ltd.*[17]]

T. G. Roche Q.C., in reply, referred to *Shackell* v. *Rosier*[18]; *Berg* v. *Sadler and Moore*[19]; *Scott* v. *Brown, Doering, McNab & Co.*,[20] and *Pearce* v. *Brooks.*[21]

Cur. adv. vult.

July 3. The following judgments were read.

Lord Evershed M.R. I will ask Morris L.J. to deliver the first judgment.

---

[11] [1957] 1 Q.B. 267; [1956] 3 All E.R. 683.

[12] [1899] 1 Q.B. 816; 15 T.L.R. 286.

[13] [1921] 3 K.B. 327; 37 T.L.R. 733.

[14] [1942] A.C. 435; 58 T.L.R. 125; [1942] 1 All E.R. 142.

[15] 32 Ll.L.Rep. 272.

[16] 52 Ll.L.Rep. 27.

[17] 45 Com.Cas. 244.

[18] (1836) 2 Bing.N.C. 634.

[19] [1937] 2 K.B. 158; [1936] 2 All E.R. 456.

[20] [1892] 2 Q.B. 724; 8 T.L.R. 755.

[21] (1866) L.R. 1 Exch. 213.

C. A.
1957

Brown Jenkinson & Co. Ltd.
v.
Percy Dalton (London) Ltd.

Morris L.J. The question which is raised in this appeal is whether, on the facts of this particular case, an agreement to indemnify against the consequences of issuing a clean bill of lading is enforceable. The case is one in which the issuing of a clean bill of lading was not justified having regard to the condition of the goods which were shipped.

[His Lordship stated the facts set out above and continued:] To the claim made in the action on the contract of indemnity, the defendants advance the defence that it is unenforceable, because it was founded on an illegal consideration. This plea comes with singular ill grace from those at whose request the procedure at the time of shipment was adopted: they are prepared to condemn their own conduct, in order to save their own pocket. But the legal issue which arises must be determined, and it is perhaps of a nature which transcends in importance and, in any event, cannot be affected by any considerations as to the relative merits of the attitudes of the parties.

It is, I think, clear that the plaintiffs did not desire that anyone should be defrauded. In agreeing with the defendants, they did not have any such desire as their real purpose. (Compare *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch.*[1]) But the question which here arises is whether the contract sued upon was founded upon an illegal consideration. An agreement is illegal and unenforceable if it has as its object the commission of a tort. (Compare *Shackell* v. *Rosier.*[2]) It is said that the contract here is illegal because it had as its object the making by the shipowners of a fraudulent misrepresentation. The question arises whether this is so: if so, the further question arises whether the position is affected by the circumstance that the claims made upon the shipowners were satisfied.

The promise of the defendants was in effect this: if you will at our request make no mention on the bill of lading that the barrels are "old and frail containers in leaking condition," we will indemnify you against any loss you may suffer. That is the same as requesting that a clean bill of lading should be issued, when the known facts did not entitle anyone to issue such a bill.

The first question which arises is whether, when the clean bill was issued, it contained a representation. In my judgment it clearly did. The bill of lading recorded that the 100 barrels were shipped "in apparent good order and condition." The barrels were manifestly in bad order and they were leaking. In *Silver*

---

[1] [1942] A.C. 435, 445; 58 T.L.R. 125; [1942] All E.R. 142.

[2] (1836) 2 Bing.N.C. 634.

v. *Ocean Steamship Co. Ltd.*[3] Scrutton L.J. said: "It has been decided by Channell J. in *Compania Naviera Vasconzada* v. *Churchill & Sim*[4] and affirmed by the Court of Appeal in *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*[5] that the statement as to 'apparent good order and condition' estops (as against the person taking the bill of lading for value or presenting it to get delivery of the goods) the shipowner from proving that the goods were not in apparent good order and condition when shipped and therefore from alleging that there were at shipment external defects in them which were apparent to reasonable inspection." Scrutton L.J. said[6]: "The last objection was that the witness did not say he relied on the bill of lading being a clean bill of lading by reason of the statement as to good order and condition. The mercantile importance of clean bills of lading is so obvious and important that I think the fact that he took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it."

Greer L.J. in his judgment said this[7]: "The bill of lading contained the words 'shipped in apparent good order and condition,' and the first question to be determined is whether the defendants are estopped by these words from alleging that the goods were either in a damaged condition when shipped, or that they were insufficiently packed by reason of the fact that the tins were square and unprotected. It was decided in *Compania Naviera Vasconzada* v. *Churchill & Sim*[8] that those words in a bill of lading are not contractual, but that they contain a representation of fact which may create an estoppel in favour of a purchaser relying on the words in the bill of lading and acting on them to his detriment. The case was decided in 1905, and I think we ought to accept as good law the proposition that the words are not words of contract but only representations which may give rise to an estoppel."

There being a representation, it seems to me that the representation was certainly shown to be false. It was further shown that it was false to the knowledge of the shipowners through those who were acting on their behalf.

The next question which arises is whether the false representation was made by the shipowners with the intention that

[3] [1930] 1 K.B. 416, 425; 46 T.L.R. 78.

[4] [1906] 1 K.B. 237; 22 T.L.R. 85.

[5] [1924] 1 K.B. 575.

[6] [1930] 1 K.B. 416, 428.

[7] Ibid. 432.

[8] [1906] 1 K.B. 237.

it should be relied upon. A shipowner clearly intends that the bill of lading he issues should be relied upon. He intends that it should be relied upon by those into whose hands it properly comes: consignees, bankers and indorsees must be within his contemplation. A bill of lading is issued with the purpose that it should be relied upon. This could not have been more clearly illustrated than it was in the testimony of the plaintiffs' witness. He knew, for example, that banks are very often only prepared to advance money if clean bills of lading are forthcoming. If a shipper knows that he will only be paid if he can present a clean bill of lading and knows that the goods he is shipping are so defective that they could not be given a clean bill, and if, in order to get his money, he persuades a shipowner to issue a clean bill, and if the shipowner both knows that a clean bill ought not to be issued and that the bill will be relied upon by others, it seems to me impossible to contend that the shipowner does not make a representation with the intention that it should be acted upon.

In the present case the actual facts were as follows. The defendants knew that the barrels were leaking. They sold them to Vipa. Vipa's representative Visser saw them in England. He knew that they were leaking. The defendants sold to Vipa f.o.b. London. The defendants were to forward the documents to Vipa's bank in Rotterdam and were to be paid net cash against documents. Vipa's bank was the Slavenburg bank. The defendants' managing director in his evidence gave an account of what had happened. [His Lordship read certain passages from that evidence and continued:] In that evidence the defendants' managing director was saying that Vipa's bank did not lose because the goods were sold. What had happened was that Vipa resold to Mertens of Hamburg: the resale was on c.i.f. terms. Vipa had taken out an all risks insurance policy. When the 100 barrels were discharged at Hamburg the outturn report noted as follows: "Old "barrels—greater part of which leaking." Later Mertens made complaints. They held Vipa responsible and also the shipowners. They held the latter responsible "for the damage occurring on "the voyage." Mertens wrote to the Hamburg agents of the shipowners as follows: "When receiving the above consignment "I noted that the above barrels leaked considerably. I immediately called coopers who secured the barrels and the weighing "by customs authorities showed a loss of weight of 2,202 kilos. "I have to hold you responsible for the damage occurring on the "voyage, and I shall let you have a detailed list of the damage."

They received a reply as follows: "I acknowledge receipt of "your letter of the 12th instant and regret to inform you that I "am unable to accept your claim in respect of a loss of weight "of the above consignment. According to the terms of the bill "of lading the vessel is not responsible for the contents and the "weight. As you know the consignment was shipped from "London to Hamburg unto 'order.' After my inquiry your firm "was given to me as the receivers and I notified you of the arrival "on April 13, 1956, but you presented the original bill of lading "only on April 20, 1956. My agents in London informed me "that the barrels were already in a very poor condition when "delivered for shipment and some of them were leaking. During "the long period of storage even more of the contents were lost. "With regard to the packing I must ask you to contact the "shippers in London directly." What followed was that Mertens claimed against the insurers. A considerable quantity of the orange juice had leaked away and been lost: the claim was in respect of the quantity lost. The insurers paid Mertens and were subrogated to all Mertens's rights and remedies. The insurers claimed against the shipowners, who at first refused to pay. Eventually, under threat of legal proceedings, the shipowners paid and they claimed against the defendants on the indemnity.

On the facts as found, and indeed on the facts which are not in dispute, the position was therefore that, at the request of the defendants, the plaintiffs made a representation which they knew to be false and which they intended should be relied upon by persons who received the bill of lading, including any banker who might be concerned. In these circumstances, all the elements of the tort of deceit were present. Someone who could prove that he suffered damage by relying on the representation could sue for damages. I feel impelled to the conclusion that a promise to indemnify the plaintiffs against any loss resulting to them from making the representation is unenforceable. The claim cannot be put forward without basing it upon an unlawful transaction. The promise upon which the plaintiffs rely is in effect this: if you will make a false representation, which will deceive indorsees or bankers, we will indemnify you against any loss that may result to you. I cannot think that a court should lend its aid to enforce such a bargain.

The conclusion thus reached is one that may seem unfortunate for the plaintiffs, for I gain the impression that they did not pause to realize the significance and the implications of what they were asked to do. There was evidence that the practice of giving indemnities upon the issuing of clean bills of lading is not uncommon. That cannot in any way alter the analysis of the present transaction, but it may help to explain how the plaintiffs came to accede to the defendants' request. There may perhaps be some circumstances in which indemnities can properly be given. Thus if a shipowner thinks that he has detected some faulty condition in regard to goods to be taken on board, he may be assured by the shipper that he is entirely mistaken: if he is so persuaded by the shipper, it may be that he could honestly issue a clean bill of lading, while taking an indemnity in case it was later shown that there had in fact been some faulty condition. Each case must depend upon its circumstances. But even if it could be shown that there existed to any extent a practice of knowingly issuing clean bills when claused bills should have been issued, no validating effect for any particular transaction could in consequence result.

It can further be said that in this case the issuing of a clean bill of lading did not mean that there was non-disclosure as to some defect in the quality of the orange juice itself but only of the barrels that contained it. This, however, cannot affect the analysis of the transaction. Nor can it be doubted that it would be of great consequence for a banker, who was advancing money, to know whether it was likely that the orange juice was really in the barrels or whether it was likely that some of it would have leaked away and become irretrievably lost. Such knowledge would also obviously be of great importance to a purchaser or receiver of the goods.

It is said that a result of issuing a clean bill of lading is that a shipowner deprives himself of certain defences to claims that may be made against him. In this way advantage in one sense results for indorsees of the bill of lading and disadvantages for the shipowner. The shipowner deprives himself of the possibility of setting up certain defences, if he is sued. He cannot assert that the goods, which he has carried, were in defective condition when he received them on his ship, if he has stated on the bill of lading that they were in good condition. In *United Baltic Corporation Ltd.* v. *Dundee, Perth and London Shipping Co. Ltd.*[9] Wright J. expressed himself thus: "The shipowner delivers "the goods at the port of destination and the goods-owner points "out to him that they are damaged. Then the shipowner replies "that he is only liable to pay for such damage as occurred during

---

[9] (1928) 32 Ll.L.Rep. 272, 275.

"the voyage and that he had delivered the goods in the same "condition as that in which he received them. The goods-owner "replies: 'That may be so in fact, but you are estopped because "'you have stated on the bill of lading on the faith of which I "'take up the goods and pay for them—I have acted to my "'prejudice on this bill of lading—you have stated on that very "'authoritative document that you received them in apparent "'good order and condition and you cannot now be heard to say "'the contrary: therefore you are by this estoppel, by this fiction "'or convention, liable for the difference between their sound "'value and the actual damaged value which they show.'" See also *Compania Naviera Vasconzada* v. *Churchill & Sim* [10]; *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*,[11] and the *Silver* [12] case to which I have already referred.

It was pointed out by Mr. Roche that though there may be an estoppel against the shipowner, the holder of a clean bill of lading may still be in great difficulties if defective goods are shipped. He may have resold the goods and he may find that his purchaser will not accept, and he may sometimes experience great practical difficulties in suing the shipowner if, for example, the shipowner is a foreign shipowner. If he sues the shipowner, the latter may be entitled to rely on some clause in the bill of lading which protects him: furthermore, some time limit may prove fatal to a claim. But in any event buyers and bankers who act on the faith of clean bills of lading are not seeking law suits.

Some of the considerations to which I have referred may denote that in this particular case the plaintiffs, not being actuated by bad intentions, did not realize the viciousness of the transaction. When at the later period inquiries were being made on behalf of the continental underwriters, the plaintiffs acted with commendable frankness and made no attempt to suppress any disclosure. Thus on June 27 a letter was sent to them from insurance agents as follows: "With regard to the above consign-"ment, we send you herewith the bill of lading and the Port of "London Authority's weight account." Then, later on: "We "have been asked by continental underwriters to ascertain "whether a letter of indemnity was given to your goodselves on "the issue of the bill of lading," and then there is a reference to the letter of May 14.

The reply of the plaintiffs was as follows: "We are in receipt "of your favour of the 27th instant, with enclosures, in connexion

---

[10] [1906] 1 K.B. 237; 22 T.L.R. 85.
[11] [1924] 1 K.B. 575.
[12] [1930] 1 K.B. 416.

" with the above consignment. In answer to your inquiry, we " beg to inform you that during the loading of the orange juice " it was found that a number of the barrels were leaking, and in " consequence the shippers gave us an indemnity for issuing " clean bills of lading, covering us for old and frail containers in " leaking condition." It must, however, be remembered that the shipping line, whose claim is in these proceedings being presented by the plaintiffs as assignees of it, made effort to avoid paying and to permit the loss to be borne by others. Their attitude was shown by their letter of August 9, 1956. It is further to be noted that when Mertens made complaint, the Hamburg agents of the shipowners repudiated liability on the ground that, according to the terms of the bill of lading, the vessel was not responsible for the contents and the weight.

But whatever features there are in this case which possibly enable one to approach it with a measure of sympathetic understanding as to how the plaintiffs came to act as they did, the undisputed facts show that a short point is involved. It may be stated thus. Can A, who does what B asks him to do, enforce against B a promise made in the following terms: " If you will " at my request make a statement which you know to be false " and which you know will be relied upon by others and which " may cause them loss, then, if they hold you liable, I will " indemnify you "? In my judgment, the assistance of the courts should not be given to enforce such a promise.

The only reason why in the present case the judge upheld the contract was that he considered that no special damage was proved and that, in the absence of damage, the tort of deceit was not complete. The judge expressed himself as follows: " I do " not think that it is an illegal contract because, although " admittedly a false statement was knowingly made upon the " document, the tort of deceit is not complete in any event until " some special damage is proved and I cannot see that any " special damage can be proved in this case because all parties " have been satisfied." He further said: " The question before " me now as I see it is as to whether the plaintiffs, in agreeing " to issue a bill of lading, which was clean and should not have " been, in return for a letter of indemnity, were entering into an " illegal contract—a contract to perform a tort of deceit—and it " seems to me that it is an essential element that there should " be some loss to somebody, and I am not aware of any particular " loss in this case."

But in my judgment all the elements were present which made the consideration illegal and the contract unenforceable. Those elements were: (a) the making of a representation of fact, (b) which was false, (c) which was known to be false, (d) with intent that it should be acted upon. If the consideration for the promise was the making of such a representation, then the unlawful consideration made the contract unenforceable whether or not damage resulted to someone who acted on the representation and therefore had a cause of action. But, apart from this, there was damage in the present case. The claim that was settled was the claim of Mertens. It was a claim against the shipowners. The claim was being pressed by the continental underwriters, because they had paid Mertens' claim pursuant to their liability on an all risks insurance policy. But it seems to me that Mertens clearly had a claim against the shipowners. When Mertens pursuant to their c.i.f. contract received the bill of lading, they became entitled to all rights of suit against the shipowners, as though a contract in the terms set out in the bill of lading had been made with them. But furthermore, as is shown by the judgment of Atkinson J. in *Dent* v. *Glen Line Ltd.*,[13] they would have also a claim in tort. In his judgment Atkinson J. said: "I should "have liked to avoid the issue of fraud, but there it is on the "pleadings, and I have to state my findings about it. The "gentleman who made the statement in the witness box, I "repeat, was, in my opinion, a singularly unreliable witness, and "I find that he knew the real condition of the goods; he knew "that the chief officer had claused the ship's receipt, he knew "that if he had claused the bills of lading in the proper way "the bank would not take them up and pay, and he knew quite "well that he was saying something which was untrue when "he signed the clean bill of lading. It may very well be that he "hoped the goods would get through with only a loss of weight, "but he knew perfectly well that there was a risk of far more "serious damage than that. It seems to me that there was "present every ingredient necessary to constitute legal fraud; "he intended to mislead the bank and anyone to whom those "documents might pass."

It is to be observed there that Atkinson J. spoke of the hope that the goods would get through with only a loss of weight. But in the present case loss of weight was most important. No one would suppose that a bank that advanced money in regard to 100 barrels of juice or a purchaser of them would have been

[13] (1940) 45 Com.Cas. 244, 259; 67 Ll.L.Rep. 73.

uninfluenced by knowledge that the barrels were leaking. The description of the condition on arrival at Hamburg given by Vipa to the defendants in a letter of May 1 is revealing. They wrote: "The above mentioned lot has arrived in Hamburg as a hopeless "mess only. The orange juice was streaming like water out of "the barrels, and when Rotmans should not have taken imme-"diately action to put some men to work and to fix the iron "belts of the barrels firmer the damage should have been much "bigger. All the barrels have to be washed with water, to clean "them, for they were laying in a bath of orange juice, which "barrels have been closed by special men as we said above, and "when the goods were weighed the loss in weight was about "10 per cent."

It would appear, therefore, that loss was shown for which Mertens could have sued. It appears that the defendants took the point that as Vipa knew of the defective condition of the barrels and as it was Vipa that took out the insurance cover, the insurers need not have paid. But, if they had not paid, the position would merely have been that Mertens would have had to claim against the shipowners. Apart, however, from showing that there was actual loss, the illegality of the consideration is shown.

It was submitted by Mr. Roskill in his forceful argument that cases have been before the courts in which the point now raised was not taken either by the defendants or by the court. But that circumstance does not direct a conclusion either way in a case in which it is.

In *Holman* v. *Johnson*[14] Lord Mansfield C.J. said: "The "objection, that a contract is immoral or illegal as between "plaintiff and defendant, sounds at all times very ill in the "mouth of the defendant. It is not for his sake, however, that "the objection is ever allowed; but it is founded in general prin-"ciples of policy, which the defendant has the advantage of, "contrary to the real justice, as between him and the plaintiff, "by accident, if I may so say. The principle of public policy is "this; ex dolo malo non oritur actio. No court will lend its aid "to a man who founds his cause of action upon an immoral or an "illegal act. If, from the plaintiff's own stating or otherwise, "the cause of action appears to arise ex turpi causa, or the "transgression of a positive law of this country, there the court "says he has no right to be assisted. It is upon that ground

---

[14] (1775) 1 Cowp. 341, 343.

"the court goes; not for the sake of the defendant, but because "they will not lend their aid to such a plaintiff."

The conduct of the defendants does not merit that they should have relief from the claim now made. But issues are raised which are of more consequence than the result of the present action. For the reasons which I have set out, I consider that in this case the court should deny its assistance. I would allow the appeal.

Pearce L.J. I share the reluctance that any court must feel to find in favour of defendants whose behaviour and whose defence are so lacking in merit. But, in my view, that reluctance must be overcome, since the case raises a wider issue than the mere consideration of the respective merits of the parties.

The plaintiffs issued a clean bill of lading in respect of goods contained in barrels that were to their knowledge faulty. Thereby they made a representation of fact that they knew to be false. They knew that the purpose of the representation was to procure payment by bankers, who are very often not prepared to provide the money if the bill of lading is not clean. The bankers paid the money relying, no doubt, on the plaintiffs' representation. Others besides the bankers were affected by the representation, since subsequent purchasers were entitled to rely on the bills of lading.

I find it difficult to see what answer the plaintiffs would have had if the purchasers had sued them in fraud. The fact that the damage was subsequently made good seemed to the judge to change the quality of their act. But it does not, in my opinion, alter the fact that the plaintiffs, by making a representation of fact that they knew to be false, with intent that it should be acted on (as in fact it was), were committing a tort. They are now seeking to recover on the indemnity in consideration of which they committed the tort. Had they been actively intending that someone should be defrauded by their misrepresentation, their case would have been unarguable.

The real difficulty that arises in the case is due to the fact that the plaintiffs, whatever may have been the defendants' intentions, appear from the evidence not to have contemplated that anybody would ultimately be defrauded. Theirs was a slipshod and unthinking extension of a known commercial practice to a point at which it constituted fraud in law. In the last 20 years it has become customary, in the short-sea trade in particular, for shipowners to give a clean bill of lading against an indemnity from the shippers in certain cases where there is a bona fide dispute as to the condition or packing of the goods. This avoids the necessity of rearranging any letter of credit, a matter which can create difficulty where time is short. If the goods turn out to be faulty, the purchaser will have his recourse against the shipping owner, who will in turn recover under his indemnity from the shippers. Thus no one will ultimately be wronged.

This practice is convenient where it is used with conscience and circumspection, but it has perils if it is used with laxity and recklessness. It is not enough that the banks or the purchasers who have been misled by clean bills of lading may have recourse at law against the shipping owner. They are intending to buy goods, not law suits. Moreover, instances have been given in argument where their legal rights may be defeated or may not recoup their loss. Trust is the foundation of trade; and bills of lading are important documents. If purchasers and banks felt that they could no longer trust bills of lading, the disadvantage to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities.

The evidence seemed to show that, in general, the practice is kept within reasonable limits. In trivial matters and in cases of bona fide dispute, where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, no doubt the practice is useful. But here the plaintiffs went outside those reasonable limits. They did so at the defendants' request without, as it seems to me, properly considering the implications of what they were doing. They thought that they could trust the defendants' agreement to indemnify them. In that they were in error.

The general principle is not in doubt. In *Alexander* v. *Rayson*[15] this court said: "It is settled law that an agreement "to do an act that is illegal or immoral or contrary to public "policy, or to do any act for a consideration that is illegal or "immoral or contrary to public policy, is unlawful and therefore "void. But it often happens that an agreement which in itself "is not unlawful is made with the intention of one or both "parties to make use of the subject-matter for an unlawful "purpose, that is to say, a purpose that is illegal, immoral or "contrary to public policy. . . . In such a case any party to the "agreement who had the unlawful intention is precluded from

[15] [1936] 1 K.B. 169, 182; 52 T.L.R. 131.

"suing upon it. Ex turpi causa non oritur actio. The action "does not lie because the court will not lend its help to such a "plaintiff."

I do not propose to consider the cases to which Morris L.J. has already referred. In none of the cases cited before us has a plaintiff failed where he was not fraudulently minded, but was merely reckless and unthinking in committing a tort of deceit instigated by the defendant. Nor, per contra, has any case been cited where a plaintiff has succeeded in such circumstances. But recklessness is sufficient to make a man liable in damages for fraud. Here the plaintiffs intended their misrepresentation to deceive, although they did not intend that the party deceived should ultimately go without any just compensation. In an action based on deceit that state of mind would render them liable, no less than if they had been fraudulent. And I cannot avoid the conclusion that the purpose for which the clean bill of lading was given in this case was unlawful within the general principle set out above. The plaintiffs' rather haphazard belief that no one would be ultimately defrauded, though it affects their merits, does not in my view improve their legal position in this case.

For the reasons already given so clearly by Morris L.J., in my opinion the appeal should be allowed.

Lord Evershed M.R. I have, after much hesitation and with the diffidence due to the judgments of my brethren, reached a different conclusion: for I am not satisfied that, upon the facts of this case and the findings of the judge, the court is justified in holding that the plaintiffs' action arises ex turpi causa and must therefore be dismissed.

The well-known Latin formula at least requires translation. In *Alexander* v. *Rayson* [16] the principle was stated by this court in the passage already recited by my brother Pearce. "It is "settled law that an agreement to do an act that is illegal or "immoral or contrary to public policy, or to do any act for a "consideration that is illegal or immoral or contrary to public "policy, is unlawful and therefore void. But it often happens "that an agreement which in itself is not unlawful is made with "the intention of one or both parties to make use of the subject-"matter for an unlawful purpose, that is to say, a purpose that "is illegal, immoral or contrary to public policy. . . . In

[16] [1936] 1 K.B. 169, 182.

C. A.

1957

Brown Jenkinson & Co. Ltd. *v.* Percy Dalton (London) Ltd.

Lord Evershed M.R.

"such a case any party to the agreement who had the unlawful "intention is precluded from suing upon it. Ex turpi causa "non oritur actio."

The adjective "turpis" is thus expanded to cover the three characteristics: (1) illegal, (2) immoral and (3) contrary to public policy. The classic case of *Pearce* v. *Brooks*[17] is the obvious instance of immorality; and when the purpose of the agreement, or the intended use of its subject-matter, is the commission of a crime or the doing of some prohibited act (for example, the infringement of the customs law), the principle is no less obviously invoked on grounds both of illegality and of public policy. The principle no doubt extends further. In *Alexander* v. *Rayson*[18] itself, the proved purpose of the plaintiff was to use the instruments, which he entered into with the defendant, in order to deceive and cheat (as he did) the local rating authority: and in *Berg* v. *Sadler and Moore*[19] (to take an example from the cases cited to us) the plaintiff was shown to have been engaged upon an enterprise of deliberate deception which amounted to a false pretence.

But how much further does it go? Does it cover every case in which the subject-matter of the action is shown to be part of a transaction which has involved the making by the plaintiff of a statement known to be untrue in a commercial document intended to be acted upon in the ordinary commercial course, even though it is not proved to have been acted on in fact by anyone, or (if it has been acted upon) not to have caused loss or damage to any person: and even though the plaintiff is not shown to have had at any stage in the transaction any intention that anyone should be damnified or to have been "dishonest" as that word is ordinarily understood? The defendants' argument says that an affirmative answer must be given to the question. But I am not for my part satisfied that it is so. Having considered, as best I can, all the cases upon the subject which were cited to us in argument and which I have been able to find, there appears to me to be no authority which compels this court to so rigid a conclusion.

The defendants' contention inevitably involves a pleading by him of his own wrong. I do not see, as a matter of principle, why he should be allowed so to do, unless it clearly appears that the transaction is so tainted with wrongful conduct or intention on the plaintiffs' part that the court ought not, as a matter of public policy, to lend to them its help. In Professor Winfield's book on Torts, 6th ed., p. 30, it is stated: " . . . a contract "whereby A agrees that B shall commit an injury to A, which "would otherwise be a tort, is often perfectly lawful: *e.g.*, many "acts which would otherwise be trespasses or nuisances are "frequently permitted by a contract. Secondly, it is not always "true that, even if A and B agree between themselves to commit "a tort against a third party, the agreement is unlawful: *e.g.*, "if they agree to trespass on C's land in order to decide a "disputed right of way. Probably the law is best stated by "saying that where the conduct contemplated is likely to menace "public morality or safety, or (more broadly) is contrary to "public policy, any contract to pursue such conduct is unlawful, "and generally nothing is recoverable in contract by the injured "party."

---

[17] (1866) L.R. 1 Ex. 213.

[18] [1936] 1 K.B. 169.

[19] [1937] 2 K.B. 158; 53 T.L.R. 430; [1937] 1 All E.R. 637.

I would accept that statement as correct: see also the judgment of Mansfield C.J. in *Holman* v. *Johnson*[20] cited by my brother Morris. If the statement be correct, then it seems to me to follow that the answer to the present case must depend upon the true conclusion to be derived from its special facts. Upon those facts as they were proved or found, is the conduct of the plaintiffs so tainted with "turpitude" that the court must, as a matter of public policy, refuse them any relief?

It is not in doubt, upon the findings of the judge and, indeed, upon the admission of the plaintiffs' witnesses in the witness box, that the plaintiffs, in issuing a clean bill of lading, deliberately put their names to a commercial document which represented that the orange juice shipped by their principals was "in good order and condition," a representation which, as regards the casks or barrels in which it was contained, they perfectly well then knew to be false in fact. Wright J., a judge exceptionally experienced in commercial causes, condemned in *United Baltic Corporation Ltd.* v. *Dundee, Perth and London Shipping Co. Ltd.*[21] a somewhat similar performance in plain terms in the year 1928: and the passage of 29 years can, in the eye of any of Her Majesty's courts, lend no enchantment whatever to the continuance of a general practice on the part of any section of Her Majesty's subjects, in whose keeping in some degree must reside the good name and business reputation of Englishmen, whereby falsehood is treated as a convenient fiction for serving business interests.

[20] 1 Cowp. 341.

[21] 32 Ll.L.Rep. 272.

True, a witness of standing called for the plaintiffs stated that, in the circumstances of the present case as they were proved, he would not for his part have been prepared (as were the plaintiffs) so to prefer the wishes of his customer by making in the bill of lading a deliberately false statement. And no one of the parties in the present case, who later became in any way interested in the goods shipped by the plaintiffs' principals, was in fact in any way damnified as a result of the plaintiffs' falsehood; and that (as the judge impliedly but, as I think, clearly found) it was never for a moment intended by the plaintiffs that they should.

But it is one thing to follow previous judicial authority in expressing disapproval of a commercial practice which appears to place business convenience before simple truth: it is another to say that the defendants, at whose express request and for whose own convenience the plaintiffs in the present case issued the clean bills, should be entitled to escape the performance of their clear promise of indemnity by invoking the rule of public policy (as I think it is) that the courts will not enforce contracts entered into for illegal or unlawful ends. As Lord Goddard C.J. has recently observed, public mischief and public policy are unruly horses, and not all who try to mount are found able to ride them. A defendant who seeks to escape from his bargain upon such grounds, if he is not seen to be pleading his own wrong, commonly appears in an unattractive light, as this court observed in *Scott* v. *Brown, Doering, McNab & Co.*[22]

The defendants in the present case now seek to show that they participated with the plaintiffs in a deliberate and dishonest falsehood. But their first answer to the plaintiffs' demand for implementation of the contract of indemnity was to assert that, as a result of their "own personal inspection," the containers, though "showing slight leakage," were none the less to their knowledge "comparatively sound." In the circumstances, it is not surprising that the judge said of the substantial proprietor of the defendant company and the principal witness on the defendants' behalf, that he was not a satisfactory witness and that he (the judge) could leave the credence which he put upon his evidence by saying nothing more than that. In my judgment, if the courts should be astute to see as a matter of public policy that their processes are not used for enforcing illegal contracts, it is also true that defences, which seek to invoke the principle for the purpose of evading obligations clearly and openly entered into, should be closely scrutinized and that the allegations made in invocation of the rule should be plainly proved.

---

[22] [1892] 2 Q.B. 724; 8 T.L.R. 755.

The allegations in the present case are found in the defence. They are, first, that the letter of indemnity was entered into in pursuance of a conspiracy between the plaintiffs and the defendants to misrepresent the condition of the barrels to any subsequent holder of the bill of lading: and, second and alternatively, that the consideration for the indemnity was the fraudulent misrepresentation of the plaintiffs' principals of the condition of the barrels or that its purpose was that the plaintiffs' principals should so fraudulently misrepresent their condition. It was also alleged that the purchasers from the defendants, namely, Vipa, being aware of the true condition of the barrels, requested the defendants to obtain clean bills of lading, since otherwise they could not obtain the necessary finance for the purchase; and that such facts were known to the plaintiffs or their principals before payment of the moneys for which they are seeking indemnity in the present action.

Of these allegations the third and last clearly failed, since there was no evidence that the plaintiffs or their principals had the knowledge alleged. The first defence, also, in my judgment, fails. According to the decision of the House of Lords in the *Crofter* case,[23] it is essential for the establishment of a conspiracy to defraud that the defrauding of some third party should not merely be the consequence or the possible or likely consequence of the agreement of the alleged conspirators: but should be its real purpose and aim. And there is in my judgment no ground for holding on the facts found and proved that it was the aim or purpose of the plaintiffs (at any rate) in making out a clean bill of lading to cheat or defraud anyone.

There remains the allegation that the consideration for the indemnity was that the plaintiffs or the shipowners would make or have made the fraudulent misrepresentation of the goods. There is no doubt that the plaintiffs, when asked to make out clean bills, required the defendants' indemnity, and that the plaintiffs otherwise would not have done so. The one or the promise of the one was therefore no doubt the consideration for the other or its promise. There is also no doubt that the description of the goods in the bill as "in apparent good order "and condition" was, when the plaintiffs made it, known by them to be untrue. It was much and forcibly pressed upon us by Mr. Roche that a man in such circumstances must be

[23] [1942] A.C. 435.

taken to apprehend the consequences of his acts, namely, in this case, that some third party might be deceived by the representation and alter his position for the worse in reliance upon it, and Mr. Roche demonstrated by his illustrations that circumstances, by no means extravagantly imagined, might in similar cases arise in which some person, having relied upon the representation in the bill, would be liable to suffer loss in consequence.

Mr. Roche relied upon *Dent* v. *Glen Line*[24] to show that the plaintiffs would have been liable to such a third party for the tort of deceit—at least if they resisted a claim to compensation for the loss suffered: and Mr. Roskill was on his side disposed to concede that the plaintiffs would, in such case, have been so liable. But in *Dent's* case[24] the shipowners' denial of liability to the third party made it impossible for him, on the facts found and as Atkinson J. held, to assert the absence of an intention to deceive. In the present case the plaintiffs themselves (whatever may be said of their principals) made no attempt whatever to deny or dispute liability to make compensation for the loss of the orange juice attributable to the leaking condition of the casks. But does it follow that, when the plaintiffs made the agreement with the defendants, they were parties together to an arrangement so involving, to the knowledge to be attributed to both of them, the commission of the tort of deceit as to bring the case within the principle of public policy, which condemns such contracts as unenforceable? Have the defendants so proved? I have earlier recorded that the judge did not, in terms, find that the plaintiffs, however misguided and irresponsible, were nevertheless honest; though I read his judgment as indicating that he thought them so. At least it is plain that there is no finding of dishonesty against the plaintiffs. The judge appears to have rejected the charge of fraud on the ground of the absence of any proved loss or damage to anyone which would be an essential element in any action on his part based on the tort of deceit. But I agree with Mr. Roche in thinking that the judge's test is not, with all respect to him, for present purposes satisfactory. If in fact the plaintiffs were parties to a bargain with the defendants the consideration for which on the plaintiffs' part was the making by them of a fraudulent misrepresentation, it would not, in my judgment, be a sufficient answer to the defence merely to show that in fact no one was deceived or damnified; though I observe that in the present case

---

[24] 45 Com.Cas. 244.

C. A.
1957

Brown Jenkinson & Co. Ltd.
v.
Percy Dalton (London) Ltd.

Lord Evershed M.R.

(unlike many other cases in which the rule was applied) there was no evidence given that anyone, banker or purchaser, either in fact relied upon or was deceived by the representation in the bill. But the question remains: ought this court to hold that the plaintiffs fraudulently, that is dishonestly, represented the goods as being in good order and condition? That question must, I apprehend, be answered by applying to it the ordinary meaning of words and the ordinary standards observed by honourable men.

In answering the question it is in my judgment both legitimate and necessary to bear in mind certain important facts. First, the transaction with which we are concerned followed an earlier shipment of the same general stock of orange juice. On the earlier occasion (in December, 1955) the plaintiffs had issued a clean bill of lading and, according to the evidence of their witness, Mr. Broome, no difficulty or problem had arisen. What the full facts were in regard to the earlier shipment was not investigated at the trial: but it is at least possible that, on this earlier occasion, all parties concerned as bankers, purchasers or sub-purchasers were fully informed of the condition of the barrels and that no one was at any stage misled, and it may therefore be said that the court ought not, at the instance of these defendants, to assume otherwise. It is, after all, to be borne in mind that the consequence of the frailty of the barrels was, and was only, loss of some part of the orange juice. No question of the quality or characteristics of the juice itself was involved. At worst a purchaser or sub-purchaser would get less than the full quantity which the casks should have contained; a matter for which, prima facie at any rate, a money payment would provide full and proper compensation—as it did in the present case upon payment by the shipowners.

Secondly, it is not in doubt that the course adopted by the plaintiffs, if reprehensible, was recognized as a common commercial practice of long standing at least in many types of case. Mr. Eastham observed, in the course of the trial on the first day: "I do not think my friend need worry about that. I am "perfectly prepared to concede that these letters of indemnity, "whether they be right or wrong, are commonly used in the "trade. I think everybody knows that they are commonly used, "the question is: are they legal or illegal?"

I add two citations from Mr. Broome's evidence, one given in chief and one in cross-examination, which, in my view, may be taken as typically representative of his state of mind. In chief

C. A.
1957

Brown Jenkinson & Co. Ltd.
v.
Percy Dalton (London) Ltd.

Lord Evershed M.R.

he said: " (Q.) How do you feel to be told that it is worthless? " (A.) Very upset, naturally. We took it in good faith, and " when the events against which we were indemnified occurred, " we felt we ought to be covered. As a matter of fact, this is " the first one with which we have had any trouble at all. " (Q.) Do you know from your own experience whether or not " other agents or shipping companies employ the same practice? " (A.) Yes, they do. (His Honour): Do you employ this practice " purely on what you call the short-sea trade? (A.) No, your " Honour; also in the deep-sea trade. But there are not so " many in the deep-sea trade as on the short-sea trade, because " there is usually time for the shipper, if necessary, to rearrange " his credit. (Q.) You said that this indemnity was, apparently, " adopted in Germany? (A.) Yes. You see, these ships leave " London on the Wednesday, and they are discharged in " Hamburg on Friday, and in the meantime all the documents " have to be got out there, so we are rushed for time."

In cross-examination: " (Q.) All I am trying to see is whether " you agree that insurers are very largely affected if, in fact, bills " of lading are stated to be in apparent good order and condition " when everybody knows at the material time that the goods " were such that they should have been claused. (A.) Can we " push that a little further? Assume that the bills are frauds, " then the receiver could not claim on the insurance company. " (Q.) Exactly. Let us now turn our attention to a third class " of person who is likely to be affected by the falsehood appearing " on the bill of lading. Are you aware that many of these purchasers of goods on the continent obtain financial assistance " from their bankers? (A.) Well, I know that letters of credit " exist; but how they are manipulated, I do not know. (Q.) We " know from this correspondence that Vipa's bank—Vipa being " the purchaser—was Slavenburgs? (A.) That was mentioned, " yes. (Q.) I am suggesting to you that the person who puts up " the money (the banker) is very often only prepared to put up " money if, in fact, the goods are shipped with a bill of lading " which is clean, and is not prepared to put up the money if " there is a claused bill of lading. (A.) That is the reason " shippers ask us to issue clean bills of lading in exchange for " an indemnity."

I have set out these passages at a little length because from them, in the absence of any precise finding by the judge, this court must reach a conclusion whether or no the plaintiffs were fraudulent in representing as they did. The cited passages seem

C. A.
1957

BROWN JENKINSON & Co. LTD.
v
PERCY DALTON (LONDON) LTD.

Lord Evershed M.R.

to me at least consistent with the view that the plaintiffs were treating (at the request and for the convenience of the defendants), no doubt without closer or more careful consideration, what they regarded as established practice in a short sea voyage as applicable to the circumstances of the present case. That the practice was common enough (whether appropriate or not to the exact and, to the plaintiffs, novel circumstances of the present case) was amply proved by the production of similar documents of indemnity from other shipowners; but I do not pause further upon this aspect of the matter in view of the clear concession made by Mr. Eastham.

As appears from the passages of Mr. Broome's evidence which I have quoted, time in these matters is short, and, in the present case, Mr. Roskill made the point that the incidents of the present transaction almost all occurred on April 4—the invoice, the shipment, the bill and the indemnity. I attach some importance—and this is the third matter of fact to which I desire to draw attention—to the last paragraph of the indemnity signed by the defendants: "Finally we . . . declare that we give our "unqualified consent to a copy of this document being issued, if "required, to receivers, underwriters and other persons who in "the opinion of the . . . shipowners or their representatives "may directly or indirectly be concerned." At least the plaintiffs may fairly say that there was no secrecy or mystery about it; and in fact, pursuant to the authority given to them, they did disclose to those who were affected the existence and terms of the indemnity.

Lastly, it is not to be forgotten that by the issue of the clean bills the plaintiffs or their principals assumed themselves a liability from which a claused bill would have protected them: for it is not in dispute that, as against anyone who might claim in respect of the loss of the orange juice, the plaintiffs and their principals would be estopped from denying that the juice and its containers were in good order and condition when received on board their ship.

In the light of these matters of fact, this court ought not, in my judgment, and in the absence of any finding of dishonesty against the plaintiffs by the judge who heard and saw the witnesses, to hold that the defendants established their allegation that the consideration for the indemnity was that the plaintiffs made or should make a fraudulent misrepresentation of the condition of the goods.

C. A.
1957

Brown Jenkinson & Co. Ltd.
v.
Percy Dalton (London) Ltd.

Lord Evershed M.R.

Mr. Roche, in his reply, was, as I understood him, disposed to concede the difficulty in the way of his allegation of conspiracy, having regard to the decision in the *Crofter* case.[25] But he contended, as a further alternative, that the plaintiffs knew, or must be taken to have known, that the defendants intended on their part to make a dishonest use of the bill of lading or of the fact that it contained a representation of the good order and condition of the orange juice. This line of defence may fairly be said to come with singularly ill grace from the defendants. But it is open to the objection that it was nowhere pleaded—and I refer again to the alternative plea in paragraph 6 of the defence to the effect that the proposed use by Vipa (and not the defendants) was at some stage known to the plaintiffs. And it is also open to the still more serious objection that the suggestion was never from first to last put in cross-examination to the plaintiffs' witness, Mr. Broome. In my judgment, we should not hold that this defence was established by the defendants.

I do not forget that if the contract here sued upon is one of the class which upon grounds of public policy the court must, if necessary of its own motion, refuse to recognize or enforce, then this court must so declare, and will not be deterred from so doing by the disfavour with which it may regard the defendants who seek to take advantage of the result. But the court must reach its conclusions upon the facts proved in the case before it—that is, upon the evidence given on the one side or the other; and the evidence will in large measure depend upon, and must be judged in the light of the issues raised in the action.

Taking all these considerations into account, and having regard to the four matters of fact to which I have above referred, I am not satisfied that we, in this court, should hold that the contract of indemnity made between plaintiffs and defendants was a bargain involving, as the plaintiffs knew and intended or should be taken to have known and intended, a fraudulent misrepresentation on the defendants' part and therefore is a contract unenforceable by the plaintiffs. Thoughtless, misguided and irresponsible the plaintiffs may have been; but I am not satisfied for my part, on the evidence and what I take to have been the views of the judge, that it would be just for this court to condemn them as fraudulent and dishonest.

But even if we should conclude that the representation was made with such recklessness as to amount, in law, to the same

---

[25] [1942] A.C. 435.

C. A.
1957
Brown Jenkinson & Co. Ltd.
v.
Percy Dalton (London) Ltd.
Lord Evershed M.R.

thing as a representation made with the deliberate intention of deceiving, still I am not satisfied that it would be right to hold, or that any authority compels us to hold, that the proved circumstances were such that it would be contrary to public policy, contra bonos mores, to allow the plaintiffs to recover upon the contract of indemnity from the defendants. I have, I hope, sufficiently perused all the authorities, including those cited by my brother Morris. I have failed to find any case (apart from those involving immorality or public illegality) in which, upon the principle ex turpi causa non oritur actio, a plaintiff has been cast from the seat of judgment who has not been found personally dishonest. If there was a false statement deliberately made, it was made in accordance with a practice that was common and well known in the trade and with an intention that any consequences should be covered by their or their principals' liability to make compensation—in other words, in circumstances in which the plaintiffs, by reason of the current laxity in that respect, honestly believed would not damage anybody.

In my judgment, the result is not one which requires the court upon grounds of public policy to deny to the plaintiffs their right to sue. I would accordingly dismiss the appeal, but, having regard to the judgment of the majority of the court, the appeal will be allowed. But, subject to argument, having regard to the dishonesty which the defendants not only admit but choose to allege on their own part, we make no order as to costs here or below.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *William A. Crump & Son; Carters.*

B. A. B.

C. A.
1957
July 15, 16.
Lord Evershed M.R., Morris and Pearce L.JJ.

In re GHEY AND GALTON'S APPLICATION.

Restrictive Covenant—Obsolete—Modification—Continued existence of covenant "would impede the reasonable user"—Meaning—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 84 (1) (*a*).

The applicants owned Blunt House, being freehold premises at Eastbourne which were subject to restrictive covenants imposed by conveyances of 1908 and 1945, under which the premises were not to be used otherwise than as a private dwelling-house without the

C. A.

1957

GHEY AND GALTON'S APPLICATION, *In re.*

consent of the covenantee. Blunt House was situate in an area which had been developed as a residential area by the Dukes of Devonshire. The area was still residential but licences to use some premises in it for educational purposes had been granted and Blunt House was being used as a school pursuant to a stringent licence granted by the covenantees in 1951. The applicants applied under section 84 (1) (*a*) or (*c*) of the Law of Property Act, 1925,[1] for an order that the restrictions might be modified by permitting Blunt House to be used as a convalescent or rest home during such time as it was in the occupation of a certain limited company. The persons entitled to the benefit of the covenants objected to the proposed modification and had offered to grant a licence to convert the premises into flats. The Lands Tribunal did not find that the covenants ought to be deemed obsolete, that their continued existence would impede the reasonable user of the land or that their modification would not injure the persons entitled to their benefit. The tribunal, however, held that the granting of the application would not undermine the original scheme of development and made an order modifying the restrictions to the extent that a specified company would be permitted to use the premises as a convalescent home or rest house:—

Held, that, in order to satisfy the requirement in the second part of paragraph (*a*) of section 84 (1) that "the continued "existence [of the covenant] would impede the reasonable user of "the land," it must be shown that unmodified the covenant hindered to a real or sensible degree the land being reasonably used, having due regard to the situation it occupied, to the surrounding property and to the purposes of the covenant; and that it could not be said, on the evidence, that the requirement of the second part of paragraph (*a*) had been satisfied, and section 84 did not enable the court, in effect, to expropriate the covenantees in order to make possible the estimable enterprise of the covenantors. The necessary foundation for the modification not having been established, the Lands Tribunal should have refused to make an order.

The observations of Farwell J. in *In re Henderson's Conveyance* [1940] Ch. 835, 846; 56 T.L.R. 952; [1940] 4 All E.R. 1 adopted by Romer L.J. in *In re Truman, Hanbury, Buxton & Co. Ltd.'s Application* [1956] 1 Q.B. 261, 270; [1955] 3 All E.R. 559 applied.

---

[1] Law of Property Act, 1925, s. 84 (1): "The Authority . . . shall ". . . have power from time to time, "on the application of any person "interested in any freehold land "affected by any restriction arising "under covenant or otherwise as to "the user thereof or the building "thereon, by order wholly or partially to discharge or modify any "such restriction . . . on being "satisfied—(*a*) that by reason of "changes in the character of the "property or the neighbourhood or "other circumstances of the case "which the Authority may deem "material, the restriction ought to "be deemed obsolete, or that the "continued existence thereof would "impede the reasonable user of the "land for public or private purposes "without securing practical benefits "to other persons, or . . . (*c*) that "the proposed discharge or modification will not injure the persons "entitled to the benefit of the "restriction: . . ."

C. A.
1957

Ghey and Galton's Application, *In re.*

Semble that where land is bound by a restrictive covenant the benefit of which is annexed to other land, it is not competent for the Lands Tribunal, on an application under section 84 of the Law of Property Act, 1925, under cover of modifying the covenant to give no more than a personal licence to one individual to use the land for a specified purpose in breach of such restriction, nor is it competent for the Lands Tribunal to say what the tribunal will do in the future on other applications.

CASE STATED by Sir William Fitzgerald Q.C., sitting as the Lands Tribunal.

The applicants, the respondents to the appeal, Miss Fanny Louise Ghey and Miss Alice Catherine Esther Galton, applied to the Lands Tribunal under section 84 (1) (*a*) or (*c*) of the Law of Property Act, 1925, for the removal or modification of restrictive covenants affecting Blunt House at Eastbourne. Blunt House was a large freehold house with a garden in a part of Eastbourne which had been developed as a residential area over a substantial period by successive Dukes of Devonshire. The covenants in question were imposed by conveyances dated April 9, 1908, and May 31, 1945, under which the then purchasers had covenanted to observe the restrictive covenants therein contained which, in each case, included a covenant with the then Duke of Devonshire not to use the premises for any trade or business whatever or otherwise than as a private dwelling-house without the consent of the covenantee. The benefit of the covenants was annexed to the Compton Place estate. It appeared from maps, which were put in evidence, that the area in which Blunt House was situate was residential in character, many of the houses had been converted into flats, others were being used under licence for educational purposes. There were no boarding-houses or hotels near Blunt House. A licence had been granted on October 11, 1951, for the use of Blunt House as a school. The applicants applied under section 84 that the covenants might be modified so as to permit the premises to be used as a convalescent or rest home during such time as they were in the occupation of, or under the control of, the Metal Box Co. Ltd. The application was opposed by the trustees of the Chatsworth Settlement as owners in equity of Compton Place, by the Duke of Devonshire, the legal owner, and by the owners of neighbouring properties.

It appeared from the case stated, which is more fully set out in the judgment of Lord Evershed M.R., that the applicants had been offered a licence permitting the conversion of the premises into flats.

The Lands Tribunal held that the proposals of the applicants to use Blunt House as a well-conducted rest home or convalescent home for the employees of a reputable firm would be more advantageous, from the point of view of the owners of the surrounding houses, than the conversion of the premises into flats. He found that the modification would not "undermine" the original scheme of development and he made an order modifying the restriction to the extent that the Metal Box Co. Ltd. should be permitted to use Blunt House as a convalescent home or rest house for their employees.

The persons entitled to the benefit of the covenants appealed. The grounds of the appeal were that:

"(1) The Lands Tribunal had no jurisdiction to make the "order made as the result of such decision since

"(a) there was no finding that by reason of changes in the "character of the property or the neighbourhood or of any other "circumstances the said restrictive covenants ought to be deemed "obsolete, and . . .

"(c) there was no finding that the continued existence of the "said restrictive covenants would impede the reasonable user "of the land for public or private purposes without securing "practical benefits to other persons, or would unless modified "so impede such user, and

"(d) there was no finding that the proposed discharge or "modification would not injure the appellants, they being persons "entitled to the benefit of the said restrictive covenants, and

"(2) The order modifying the said restrictive covenants to "the extent only of enabling the Metal Box Co. Ltd. to use the "property as a convalescent home or rest home for its employees "amounted to the granting of a personal licence to the said company which was not within the powers of the Lands Tribunal."

At the time when the appeal was heard it appeared that the interest of the original applicants was a limited one and that the person primarily interested was the Metal Box Co. Ltd., who were joined as respondents to the appeal.

G. H. Newsom Q.C. and *Lionel Abel-Smith* for the appellants, the respondents to the application. The appellants first attack the decision of the Lands Tribunal on the ground that there is no finding of the facts necessary to found its jurisdiction under section 84 (1). Secondly, it is contended that the tribunal cannot give a mere licence to one individual to use the premises in breach of the covenants. Reliance is placed on the decision in *In re Truman, Hanbury, Buxton & Co. Ltd.'s Application*,[2] where the meaning of "obsolete" in section 84 (1) was considered. It is crucial to consider whether the purpose intended in 1908 and 1945, when the covenants were imposed, is still being achieved. There is no finding that it is not. These covenants are not obsolete. The tribunal has no power to bind any future tribunal. [Reference was made to *In re Henderson's Conveyance*[3] and *Driscoll* v. *Church Commissioners for England*.[4]]

Ingress Bell Q.C., *W. B. Harris* and *W. J. Glover* for the applicants and the Metal Box Co. Ltd., the respondents to the appeal. The court has power under R.S.C., Ord. 58B, to draw inferences of fact from the facts set forth in the case. It is asked to do so here and to hold that the tribunal did find the necessary facts to found the jurisdiction. If not, the court is asked to exercise its power under the order to send the case back to the tribunal for amendment. It does not appear from the decision on which limb of section 84 (1) (*a*) it is founded. It is submitted that the restrictions are obsolete. There are in the neighbourhood of Blunt House a large number of premises used as institutions, mostly as schools. Other premises have been turned into flats. The tribunal rightly found that there had been "vast" changes in the character of the neighbourhood. The proposed user of the premises as a convalescent rest home for the employees of the Metal Box Co. Ltd. will not injure the persons entitled to the benefit of those covenants. Such a home is nearer in character to a private house than a school. The decision of the tribunal can be supported. The covenants are obsolete because the premises cannot now be used as single private dwelling-houses, as was the original intention: *Driscoll* v. *Church Commissioners for England*.[4] The fact that if this application is granted some other person bound by these covenants may obtain similar relief is not material to a consideration of this application. The application is within paragraph (*c*), in that the proposed change will not injure the persons entitled to the benefit of the restrictions. [Reference was made to *Chatsworth Estate Co.* v. *Fewell*.[5]]

The tribunal is entitled to modify a covenant in favour of one specified individual. The tribunal can say that the covenant is obsolete so far as it entitled the covenantees to refuse a change of user without giving any reason. This covenant unmodified is obsolete because modification is required. There is no power in the covenantees to refuse a proper modification without giving reasons. Secondly, the continuance of the covenants unmodified would not secure any practical benefits to the covenantees and is within the second limb of paragraph (*a*). The applicants have not to establish that the covenant must be discharged in its entirety. The past user as a school makes it reasonable that the premises should now be used as a convalescent home. Such user is a reasonable user. In *In re Henderson's Conveyance* [6] the judge found that the modification of the covenant would result in injury to the covenantees. In the *Truman* case [7] injury was also found. In the *Driscoll* case [8] there was a finding that the covenants were not obsolete. There are no such findings here. The proposed modification will cause no injury to the covenantees and this appeal should be dismissed.

---

[2] [1956] 1 Q.B. 261; [1955] 3 All E.R. 559.

[3] [1940] Ch. 835; 56 T.L.R. 952; [1940] 4 All E.R. 1.

[4] [1957] 1 Q.B. 330; [1956] 3 All E.R. 802.

[5] [1931] 1 Ch. 224.

G. H. Newsom Q.C. in reply. On the true construction of paragraph (*a*) the applicant must show that the reasonable user of the land is impeded, not that the proposed user is reasonable. The tribunal is not asked to say which of several users is most reasonable.

[He was stopped.]

LORD EVERSHED M.R. In my judgment, the decision of the Lands Tribunal in this case ought not to stand. The application to the tribunal was made by two ladies, Miss Ghey and Miss Galton, of Blunt House, Eastbourne, asking for an order that certain restrictions might be modified by permitting the use of the premises (that is, Blunt House) as a convalescent home or rest home. The applicants were then in negotiation with the Metal Box Co. Ltd. Before the tribunal it was made plain that the rest home proposed was one that would be conducted by that company or by its subsidiary company, known as the Metal Box Benevolent Fund Ltd., the intention being that this house should be adapted for use as a convalescent home or rest home for persons in the employ of the Metal Box Co. Ltd.

In this court it has been made clear to us that, whatever the interest now remaining in Miss Ghey and Miss Galton (if any), Mr. Ingress Bell has the instructions of the Metal Box Co. Ltd. and its subsidiary, so that we are dealing with the case upon the footing that they are persons interested in Blunt House, and they are the effective applicants for the order of modification. No question, therefore, turns upon the locus standi of any of the parties.

---

[6] [1940] Ch. 835.

[7] [1956] 1 Q.B. 261.

[8] [1957] 1 Q.B. 330; [1956] 3 All E.R. 802.

The respondents to the application—the appellants in this court—are the present Duke of Devonshire and two other persons in whom, as trustees, is vested certain property known as Compton Place. Again, no question arises as regards title. The present appellants are conceded to be the persons in whom the beneficial interest in Compton Place is vested, subject to an outstanding lease and to a licence, and they are the persons who are entitled, in that capacity, to the benefit of the covenants with which we are concerned.

The locus in quo has been illustrated for us by a plan which shows Compton Place, a considerable area in the north, and forming a segment of a circle of half a mile diameter. The area enclosed by the circumference of that circle is (putting it quite broadly) a residential area in Eastbourne. In saying "residential," I am intentionally distinguishing this area from others (which, no doubt, would not be difficult to find in Eastbourne) occupied by hotels and similar accommodation intended to provide for visitors to Eastbourne. The greater part of the houses, if you take the numbers, undoubtedly consists of residences—either single houses used as such as residences, or, more commonly, houses which have been converted into more than one dwelling-house in the form of flats and maisonettes. But it is true (and this, I think, is perhaps at the bottom of much of the argument of the applicants) that certain premises—some of them not negligible in extent—in the area are occupied for what Mr. Ingress Bell has called institutional purposes, that is to say, for the most part for educational purposes, schools of one kind and another—and in one instance as a rest home, that last-mentioned instance being on the very perimeter of the circle.

I shall say more in regard to the circumstances in which these institutional occupations came into existence; but I return first to the application. It conveniently appears from the application that the restrictions of which modification or discharge is desired are contained in two deeds, one dated in 1908 and one in 1945. I repeat those dates, 1908 and 1945; for those dates make at least this much clear, that these were not covenants which had been bequeathed to the twentieth century by those who developed their land 100 or more years ago, when social conditions were wholly different from those which obtain today.

The covenants may be said to reflect a certain propensity among conveyancers for repetition; but the substance of them is that they prohibit any use of any part of the land other than as private dwelling-houses without the consent in writing of the covenantee. In actual fact (as I have indicated) the covenants are much longer. They specifically prohibit schools, hotels, public-houses, and any trades or businesses and so forth. But the aim—the purpose—of them plainly is the preservation of the subject-matter (and the same applies to the whole of this circular area indicated on the plan) as a strictly residential area. To that statement, however, it is necessary and right to observe at once that from 1908 (the date of the first covenant mentioned in the application) certain parts of the area had already been utilized for educational purposes—that is, for schools of one sort or another. A comparison of plan " B " (which shows the character of the occupation of the area at the present time) with plan " C " (which indicates the situation in 1908) shows that, by and large, the number and identity of the institutional uses has not much changed. One or two more places have become so used, and one or two that were so used have now gone back to private occupation.

I said that I would specify a little more precisely the circumstances in which these schools are being carried on. We have not looked at the documents of title to each one of them, but we have looked at one, the grant of a licence for the use of Blunt House as a school (made in fact to the applicants). It is not necessary to read at length the conditions of the licence. It is sufficient to say that they were extremely strict. To take but one example, although a licence was given for use of the premises as a girls' school, any form of game, organized or not, on any day of the week, was prohibited. It is indeed manifest that the terms of the licence were designed to protect people who were living in what was, and was intended to remain, a residential neighbourhood from the sort of disturbance that might happen if the kind of activities, which would otherwise be associated with a school, were permitted. Similarly, as regards the use of the plot known as " Elstree " (in the extreme south-west of the area) as a rest home, the terms of the licence again were most stringent; and the licence is determinable upon three months' notice.

That, I hope, is sufficient of the background and justifies the statement which I made earlier, that the particular area enclosed in the half-mile diameter circle in plan " B " is a residential area, strictly so called and plainly intended strictly to be so maintained. It is, however, said by the applicants, as regards Blunt House, that the Metal Box Co. Ltd. is (as is plainly the fact) a responsible undertaking, and it can be assumed that the conduct of any rest home or convalescent home by the Metal Box Co. Ltd., or under its directions, will be carried out with the utmost propriety. Further, it is said that Blunt House, having been given a licence for school use, may be classified, for present purposes, as of an institutional character already, so that there is no great transition endured if you say that Blunt House will no longer accommodate girls of 16 but will rather accommodate the ailing employees of the Metal Box Co. Ltd.; and, of course, there is, from what one might call a broad, human point of view, much to be said for that view. But the first thing that it is necessary to do is to bear in mind the nature and limitations of the jurisdiction invoked. I turn at once to the terms of section 84 (1) of the Law of Property Act, 1925.

[His Lordship read section 84 (1) and continued:] There has not been a great number of cases before the courts reporting the views of the judges on the proper application of that section. I can turn at once to a case in this court of *Truman, Hanbury, Buxton & Co. Ltd.'s Application.*[1] It was a case in which modification was sought of a covenant which had been first imposed in the year 1898, intended to maintain as a residential area a certain district which had become adjacent to a main road to Southend-on-Sea. It was pointed out, in the course of the case, that the habits of the twentieth century—particularly the wish of large numbers of people to go at week-ends by road to Southend-on-Sea—had seriously altered the quietude which at one time perhaps this area had enjoyed; and what was proposed was to modify the covenant in order to enable the applicants to establish a public-house, conveniently sited on the roadway, so as to attract the custom of those passing to and from Southend-on-Sea. Since many of the houses had been turned into shops and the like, there was obviously some reasonableness in the application from the point of view, at any rate, of the brewers and of the road travellers for whose advantage the public-house would exist. None the less, the court rejected the application; and in the course of his leading judgment Romer L.J. cited, and clearly intended to approve and adopt, a passage from the judgment of Farwell J. in *In re Henderson's Conveyance*,[2] in

---

[1] [1956] 1 Q.B. 261; [1955] 3 All E.R. 559.

[2] [1940] Ch. 835; 56 T.L.R. 952; [1940] 4 All E.R. 1.

1949. In 1940 the jurisdiction, which is now vested in the Lands Tribunal (with a right of appeal on law to this court), was vested in an arbitrator (with a similar right of appeal to a judge of the Chancery Division). The language cited by Romer L.J. from Farwell J.'s judgment [3] is as follows [4]: " ' Speaking for myself,
" ' I do not view this section of the Act as designed to enable
" ' a person to expropriate the private rights of another purely
" ' for his own profit. I am not suggesting that there may not
" ' be cases where it would be right to remove or modify a
" ' restriction against the will of the person who has the benefit
" ' of that restriction, either with or without compensation, in a
" ' case where it seems necessary to do so because it prevents
" ' in some way the proper development of the neighbouring
" ' property, or for some such reason of that kind; but, in my
" ' judgment, this section of the Act was not designed, at any
" ' rate prima facie, to enable one owner to get a benefit by
" ' being freed from the restrictions imposed upon his property in
" ' favour of a neighbouring owner, merely because, in the view
" ' of the person who desires the restriction to go, it would make
" ' his property more enjoyable or more convenient for his own
" ' private purposes. I do not think the section was designed
" ' with a view to benefiting one private individual at the
" ' expense of another private individual. At any rate, primarily
" ' that was not, in my judgment, the object of this section.
" ' If a case is to be made out under this section, there must be
" ' some proper evidence that the restriction is no longer neces-
" ' sary for any reasonable purpose of the person who is enjoying
" ' the benefit of it, or that by reason of a change in the
" ' character of the property or the neighbourhood, the restriction
" ' is one which is no longer to be enforceable or has become
" ' of no value.' "

Now it is true to say that in *In re Henderson's Conveyance*,[5] paragraph (*c*) was not being invoked; so that the language of the judge was really related, and related only, to the two alternative grounds which are comprehended in paragraph (*a*). But the citation adopted, as it was, by Romer L.J., in this court, seems to me a useful prelude to a consideration of the present case, because it indicates that what has to be done, if an applicant is to succeed, is something far more than to show that to an impartial planner the applicant's proposal might be called, as such, a good and reasonable thing: he must affirmatively prove that one or other of the grounds for the jurisdiction has been established; and, unless that is so, the person who has the proprietary right, as covenantee, of controlling the development of the property as he desires and protecting his own proprietary interest, is entitled to continue to enjoy that proprietary right.

---

[3] [1940] Ch. 835, 846.
[4] [1956] 1 Q.B. 261, 270.
[5] [1940] Ch. 835.

I have indicated that in the present case three possible grounds for the exercise of the jurisdiction in the applicants' favour are indicated—two under paragraph (*a*) and one under paragraph (*c*): repeating them in that order, they are: first, on the ground that the restriction ought to be deemed to be obsolete, for the reasons indicated; secondly, that its continued existence would impede the reasonable user of the land without securing practical benefits to others; and, thirdly, that the proposed discharge or modification would not injure the persons entitled to the benefit of the restriction. It is essential, in my judgment, that one at least of those suggested matters of fact must be proved in order to found the jurisdiction; and I add that even when the jurisdiction is founded there remains (as was also laid down by this court in *Driscoll* v. *Church Commissioners for England* [6]) a discretion in the tribunal whether the power should be exercised.

Now the first difficulty which I think confronts the applicants lies in the form of the case and the decision. Mr. Ingress Bell (with his customary candour) said that he did not much like either of them; but he has asked us to read between the lines so as to find facts which the tribunal did not itself find; or, alternatively, he asks us to send it back under the powers that we have under R.S.C., Ord. 58B. First of all, however, I will read the minutes of the order which the tribunal made, because in themselves they raise a point of substance and of a little difficulty in Mr. Ingress Bell's way. The conclusion was, that the covenants "be and the same are hereby modified to "permit the Metal Box Co. to use the said lands and premises "as a convalescent home or rest home for their employees." Now it will be observed that that is in effect no more than a licence to a particular company. The covenant is said to be modified so as to permit one individual person (although a persona ficta) to use the lands as a convalescent home exclusively for their own employees. In the view that I take, it is unnecessary for me to express a final view upon this matter; but where you started with a covenant binding the land, the benefit of which runs with the land, I doubt whether it is competent for the

[6] [1957] 1 Q.B. 330; [1956] 3 All E.R. 802.

tribunal, under cover of modifying the covenant, to give in effect no more than a personal licence to one individual. I think that to do so will, or certainly may, in some cases, involve considerable embarrassment hereafter when other persons come and say: "We would like a similar privilege." It was the view of the Lands Tribunal that he could protect the respondents to the application against that eventuality (as I shall show in a moment); but there again, I venture to doubt whether it was competent for the Lands Tribunal to say what, in the future, other persons exercising the jurisdiction of the Lands Tribunal would do.

With that introduction, I will now read the essential part of the decision, which is in terms substantially reproduced in the case. After introductory paragraphs which it is unnecessary to recite, the Lands Tribunal proceed: "I can say immediately "that this tribunal would not be prepared to grant any modi-"fication which would undermine the underlying principles of the "original scheme of development devised by the Duke of Devon-"shire and now enforced by the Chatsworth Estates." Now I pause to say that that seems to me necessarily to be saying that the covenants are not obsolete, and that he (the tribunal) would not regard it as proper to do anything which would "undermine" —that is to say, subvert—the obviously intended purpose which those covenants were devised to achieve, and which they are still capable of achieving.

The tribunal goes on: "It must, however, be borne in mind "that there have been vast changes since these restrictions were "imposed." I pause again to observe that, having regard to the dates and the facts proved or admitted, I can find no evidence that there have been "vast changes." In actual fact, there appear to have been no changes at all of any significance since 1908.

"All of these houses are large, attractive buildings of the "Victorian and Edwardian periods, and it would be quite impos-"sible to maintain nowadays the restriction that they should "only be used as private dwelling-houses. This has been "recognized by the trustees, who have granted permission for "most of the houses to be converted into flats, and they are "prepared to make a similar concession in regard to Blunt "House." Again I pause to say that the question of enforcing the covenant to use the individual edifices as single dwelling-houses does not now arise, and no question of that sort is before us.

C. A.

1957

GHEY AND GALTON'S APPLICATION, *In re.*

Lord Evershed M.R.

The tribunal then refers, very briefly, to the existence of the schools, and continues: "After hearing the evidence I inspected "the area, and I must say that I should have thought the "proposal of the applicants would be preferable to the conversion "of the house into flats. This is a large house, and both it and "its garden have been admirably maintained. There is little "doubt in my mind that this prosperous company would maintain it equally well in the future. Their representative assured "me that the convalescent home would be run on the same "excellent lines as similar houses they have established in other "parts of the country. I think that the main objection is really "not so much to this particular application but to the fear of the "objectors that this would be, as they put it, 'the thin end of the "'wedge,' and would open the area up to boarding and guest "houses. As to this I would reassure them by stating that any "such development would require further application to this "tribunal, and I am confident, as I have already stressed, that "the tribunal would refuse any application which would undermine the original scheme of development. I do not think that "the granting of this application does undermine that original "scheme, and I am prepared to modify" the covenant accordingly.

The only slight variation which I find in the case stated from the terms of the decision is that, instead of the sentence which I last read, paragraph 12 of the case is thus expressed: "I was "further of the opinion that in the light of present day conditions "the granting of this application would not undermine the "original scheme of development and the trustees must be "prepared to adapt that scheme to the economic conditions "prevailing today." He had earlier said (reflecting what I have already read from the decision) that in his opinion the use by the applicants of this house as a convalescent home for the employees of a reputable firm would be more advantageous, from the point of view of the owners of the surrounding houses. With the utmost respect to the Lands Tribunal, I venture to think that he has somewhat misapprehended his function. He is not asked to say what he thinks would be advantageous from one point of view or another to the neighbours. He is not asked to act as a kind of planning authority; and though I can sympathize with his view that the Metal Box Co. Ltd. can be relied upon to conduct these premises, and indeed any premises with which they are concerned, with the utmost propriety, I think he has gone far beyond what properly is within his competence to give assurances that, if other people tried to follow the example of the Metal Box Co. Ltd., the tribunal would refuse their applications.

I need not pursue that aspect of the matter further. I come back to this, that it will have been observed from my reading of the decision that no one of the three relevant matters of fact which are required to be established has been established by any finding of the tribunal. The tribunal has not found that these covenants are obsolete. Indeed, as I read the decision, it has found that they are far from obsolete—and so, indeed, plainly, on the evidence, they are. The tribunal, equally, has not said that the continued existence of these covenants would impede the reasonable user of the land for any purpose, public or private, without securing practical benefit to other persons. Upon that matter we have been assisted by counsel on both sides to form a view what exactly those words which I have just recited indicate. It will be remembered that at the end of the passage from Farwell J.'s judgment,[7] read by Romer L.J., there is the phrase " the restriction is no longer necessary for any reasonable " purpose of the person who is enjoying the benefit of it." I am not attempting an exposition of this section which would, so to speak, replace the parliamentary language by the language of my judgment. But I think it must be shown, in order to satisfy this requirement, that the continuance of the unmodified covenants hinders, to a real, sensible degree, the land being reasonably used, having due regard to the situation it occupies, to the surrounding property, and to the purpose of the covenants. If that be the right view of the paragraph in the subsection, it seems to me quite plain that it cannot, on this evidence, be said that this second part of paragraph (*a*) of the subsection is satisfied. Indeed, some of the general observations of the tribunal seem to me expressly to negative any such view. He is, in truth, saying that this is a special privilege to be granted to a particular company in particular circumstances which ought not to be followed in any other instance. Equally, and for similar reasons, I should be prepared to say that there is no sufficient evidence here to support any conclusion that the modification proposed will not injure the persons entitled to the benefit of the restriction, namely, the appellants in this court. All that the tribunal has said is that, in his view, for the immediate neighbourhood a home for the employees of the Metal Box

---

[7] [1940] Ch. 835, 846.

C. A.

1957

GHEY AND GALTON'S APPLICATION, *In re.*

Lord Evershed M.R.

Co. Ltd. is preferable to conversion into flats. But that again is not the question which the Act requires to be answered.

For these reasons, it seems to me that the foundation for any modification of the covenant has not here been established; and, that being so, I do not say anything more on the question (already indicated) whether a modification in favour of an individual, such as that here involved, is in any case permissible. Nor do I think, in the light of the evidence, and having heard the arguments, that it would be right to exercise the power (vested in this court under Order 58B) to remit the case back to the tribunal. I shall not be thought to be casting any doubt upon the absolute sincerity of the intentions of the Metal Box Co. Ltd. to run this convalescent home excellently, or any doubt as to the laudable nature of the foundation of such a convalescent home; but in my judgment section 84 does not enable this court, in such circumstances, in effect to expropriate the respondents, the covenantees, merely in order to make possible an entirely estimable enterprise by an entirely estimable company.

I think, therefore, that in this case the Lands Tribunal should have refused to make the order; and I would allow the appeal and direct accordingly.

MORRIS L.J. I find myself agreeing so fully, both with the conclusion and with the reasoning of the judgment of my Lord the Master of the Rolls, that I do not think there is anything that I could usefully add.

PEARCE L.J. I agree.

Appeal allowed.
Order of Lands Tribunal discharged.

Solicitors: *Currey & Co.; Peacock & Goddard; Reynolds, Gorst & Porter.*

B. A. B.

C. C. A.

1957 *July 5.*

Lord Goddard C.J., Hilbery, Byrne, Slade and Devlin JJ.

REGINA *v.* VICKERS.

Criminal Law—Murder—Killing in course of other offence—Intention to maim—Burglary—Malice aforethought—Application of new law —Construction—Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *s.* 1 (1).

The appellant broke into a house with the intention of committing a burglary and was found by the owner, an elderly woman. In order to prevent recognition he struck her many blows and she died. The appellant was convicted of capital murder. He appealed on the ground that by section 1 (1) of the Homicide Act, 1957, which provides: "Where a person kills another in the course or further-"ance of some other offence, the killing shall not amount to murder "unless done with the same malice aforethought (express or "implied) as is required for a killing to amount to murder when "not done in the course or furtherance of another offence," "con-"structive malice" had been abolished, and as the death occurred in the course of causing grievous bodily harm, the necessary malice aforethought to establish murder could not be implied from that, and he was not guilty of murder, but of manslaughter:—

Held, dismissing the appeal, that the "other offence" referred to in section 1 (1) was not the causing of grievous bodily harm, but the burglary; the prosecution had to show that, independently of the fact that the appellant was committing the offence of burglary, the act which caused death was done with malice aforethought. In the present case, in addition to the felony of burglary, the appellant intended to cause grievous bodily harm and, accordingly, the necessary malice aforethought could be inferred from that intention.

APPEAL against conviction.

The appellant, John Wilson Vickers, aged 22, at about 2 a.m. on the morning of Sunday, April 14, broke into a shop with living quarters above, where an elderly woman, aged about 72, was living. He broke in with the intention of stealing. He did not expect to be disturbed as he knew that the woman was deaf. Unexpectedly she came downstairs into the cellar where the appellant was. He tried to hide behind the stairs but she saw him and came towards him. He then struck her many blows, and although the medical evidence was that the woman suffered injuries which could have been inflicted with a moderate degree of violence, she died. The appellant was charged with her murder under section 5 (1) (*a*) of the Homicide Act, 1957.[1] The jury appeared to have accepted evidence, which the appellant denied, that he had kicked her in the face. They found him guilty of capital murder.

---

[1] Homicide Act, 1957, s. 1: "(1) "Where a person kills another in the "course or furtherance of some other "offence, the killing shall not amount "to murder unless done with the "same malice aforethought (express "or implied) as is required for a "killing to amount to murder when "not done in the course or further-"ance of another offence. (2) For the "purposes of the foregoing subsection, "a killing done in the course or for "the purpose of resisting an officer of "justice, or of resisting or avoiding "or preventing a lawful arrest, or of "effecting or assisting an escape or "rescue from legal custody, shall be "treated as a killing in the course or "furtherance of an offence."

The appeal was first heard on July 1, before Lord Goddard C.J., Byrne and Devlin JJ. The appeal was then adjourned for a hearing before a court of five judges.

D. J. Brabin Q.C. and *I. H. Morris Jones* for the appellant. The judge was wrong in law in summing up on the basis that if the appellant had intentionally caused the deceased grievous bodily harm he had shown malice and was guilty of murder. In describing grievous bodily harm to the jury, the judge referred to the definitions set out in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 1002, where it is stated: "It is not "necessary that grievous bodily harm should be either permanent "or dangerous . . . if it is such as seriously to interfere with "health or comfort, that is sufficient." That test dominated the whole of the summing-up, which before 1957 was the established summing-up in cases similar to the present. The Homicide Act, 1957, however, has changed the law, and the appellant's case is based on the construction of section 1 (1) of that Act. The marginal note to section 1 is "Abolition of 'constructive malice.'" Constructive malice is nothing more than a type of implied malice. The section means that where a person is killed in the furtherance of another offence, the malice necessary to make the killing constitute murder cannot be implied from the other offence; it must be shown that the killing itself was done with malice. The application of the section can easily be seen in a case of rape, but it also applies where the other offence is grievous bodily harm under section 18 of the Offences against the Person Act, 1861.

The history of the law of malice aforethought in murder will illustrate the distinction. In Stephen's History of the Criminal Law, vol. 3, p. 54, Coke is quoted as follows: "Malice prepense "is when one compasseth to kill, wound, or beat another, and "doth it sedato animo. That is said in law to be malice fore-"thought prepensed—malitia praecogitata. It is implied in three "cases, (1) If one kills another without any provocation on the "part of him that is slain. (2) If a magistrate or known officer ". . . in doing or offering to do his office . . . is slain, that is "murder by malice implied by law. (3) In respect of the person "killing. If A assault B to rob him, and in resisting A killeth B, "this is murder by malice implied, albeit he (A) never saw or "knew him (B) before."

The matter is also considered in Hale's Pleas of the Crown, p. 451, where it is said: "Such a malice therefore, that makes "the killing of a man to be murder, is of two kinds, 1. Malice "in fact, or 2. Malice in law or ex praesumptione legis. Malice "in fact is a deliberate intention of doing some corporal harm "to the person of another. Malice in law, or presumed malice, "is of several kinds, viz. 1. In respect of the manner of the "homicide, when without provocation. 2. In respect of the "person killed; viz. a minister of justice in execution of his office. "3. In respect of the person killing. . . . Malice in fact is a "deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized." By the time of Hale, a deliberate intention of doing any bodily harm was sufficient malice aforethought to constitute murder if death ensued. Hale, p. 455 et seq., deals with the degree of harm necessary, and it appears that the judges were not unanimous on that question.

Sir Michael Foster, writing in the middle of the eighteenth century, said in his Discourses [2]: "If an action unlawful in itself "be done deliberately and with intention of mischief or great "bodily harm to particulars, or of mischief indiscriminately, fall "it where it may, and death ensue against or beside the original "intention of the party, it will be murder." Accordingly, it can be seen that there was a transition from the early days, when any harm was enough to show malice aforethought, to the intention of inflicting great bodily harm. [Reference was made to Foster's Discourses.[3]] Foster was the first person to consider that a felony was an essential ingredient. He said that where the unlawful act causing death was malum in se, the case would amount to felony and be either murder or manslaughter according to the circumstances.

A hundred years later, it appears from Russell on Crimes, 4th ed., p. 739, that where death ensued from an unlawful act done with felonious intent, that constituted murder.

Thus there are two aspects to the law of murder, one where death follows the commission of a felony, and the other where death follows the use of violence; but they are both in effect the same, because in both cases death follows an act which is malum in se. The history of the law regarding malice in murder shows that there can be no distinction when one considers the different felonies of violence, and causing grievous bodily harm is a felony of violence.

[LORD GODDARD C.J. The killing took place in the course of burglary and burglary was the "other offence" referred to in

---

[2] Fost. 261.

[3] Ibid. 256, 258, 259.

C. C. A.
1957
Regina
v.
Vickers.

section 1. The appellant did not break in for the purpose of causing grievous bodily harm. Causing grievous bodily harm has always supplied the necessary malice for murder. The grievous bodily harm was committed as a separate offence from the original offence of burglary and therefore supplied the necessary malice. If that were not so, there would have been no need for the words "express or implied" in section 1 (1) or for subsection (2).]

[Hilbery J. If in the furtherance of a second offence, which results in death, malice can be implied, then that still amounts to murder.]

In the case of rape it is not now sufficient to prove on a murder charge that death ensued in the course of the commission of the felony of rape. One has now to prove malice outside the rape. Therefore it is not sufficient in the present case for the judge to say that if the appellant committed an offence under section 18 of the Offences against the Person Act, 1861, that is sufficient to show the malice necessary for murder. The judge in the present case should have gone one step further and said that if the act of causing grievous bodily harm was dangerous to life and likely to cause death, then the jury should convict of murder. [Reference was made to *Reg.* v. *Serné*.[4]]

In his summing-up the judge used the expression "serious "bodily harm" and dealt with grievous bodily harm on several occasions. It is true that grievous bodily harm might be sufficient to imply the malice aforethought for murder, but it is not necessarily so. The jury should have been directed to the act during which the killing took place. If the judge had not in his summing-up coupled an offence under section 18 of the Offences against the Person Act, 1861, together with the killing, then there would have been no ground for complaint. If one considers a case in which grievous bodily harm is inflicted, and the attacker is convicted of an offence under section 18, if the victim subsequently dies it is not sufficient to say that he was convicted under section 18 and therefore must be guilty of murder.

[Lord Goddard C.J. If the appellant had not intended to inflict grievous bodily harm on the deceased, then her death would not have been murder. Section 1 of the Act of 1957 will overcome the anomaly whereby the killing of a woman due to an abortion has been in the past treated as manslaughter.]

It may well be that the law is being cleared up, but from the practitioners' point of view abortion was never presented as murder.

---

[4] (1887) 16 Cox C.C. 311.

Sir Reginald Manningham-Buller A.-G., Q.C., J. di V. Nahum Q.C. and *Desmond Bailey* for the Crown. A point has been raised as to the effect of subsection (2) of section 1 of the Homicide Act, 1957. If subsection (2) had not been enacted it might have been open to argument that resisting a police officer took place after the furtherance of the other offence had been completed.

With regard to the main argument based on section 1 (1), the effect of that subsection is that, if death ensues while another offence is being committed, in order to constitute murder one must prove the same malice in connexion with the killing as if there had been no other offence committed. In other words, the other offence must be ignored for the purposes of malice. The judge nowhere suggested that if the appellant caused grievous bodily harm, then the crime was murder. He put it clearly to the jury that the question was whether there was an intention to cause grievous bodily harm. An intent to kill or to cause grievous bodily harm will supply malice to constitute murder irrespective of the other offence that was being committed. The only alteration that has been made to the law by section 1 (1) of the Act of 1957 is that it is no longer possible to say that because an accused person was engaged in some other felony at the time of a killing, that that supplies the degree of malice necessary to constitute murder.

Lord Goddard C.J. stated the facts and continued: The point that has been raised on the appellant's behalf turns entirely on section 1 (1) of the Homicide Act, 1957, which came into force this year. As there was not complete unanimity among the members of the court at the first hearing of the case, I assembled a full court of five members and I am happy to say that there is now complete unanimity and the judgment I am about to deliver is the judgment of the court. The court has been much indebted to Mr. Brabin for the learned and careful argument which he has put forward on behalf of the appellant, and the matter has been thoroughly explored, and the court is now able to give this decision which will be a guidance to courts in the future. I should also like to say that in the opinion of the court the summing-up of Hinchcliffe J. was quite impeccable.

[His Lordship read section 1 (1) and continued:] The marginal note to that section, which, of course, is not part of the section but may be looked at as some indication of its purpose, is: "Abolition of 'constructive malice.'"

C. C. A.
1957

REGINA
v.
VICKERS.

"Constructive malice" is an expression which I do not think will be found in any particular decision, but it is to be found in the text books, and is something different from implied malice. The expression "constructive malice" is generally used where a person causes death during the course of carrying out a felony which involves violence—that always amounted to murder. There may be many cases in which a man is not intending to cause death, as, for instance, where he gives a mere push and a person falls down and strikes his head or falls down the stairs and breaks his neck, and although the push would never have been considered in the ordinary way as an act which would be likely to cause death, yet if it was done in the course of carrying out a felony it would amount to murder. Another illustration of "constructive malice" would be if a man raped a woman, and she died in the course of the struggle. The fact that he may only have used a moderate or even small degree of violence in the struggle would have been no defence to a charge of murder, because if he caused death, he did so during the commission of the felony of rape. Another instance of constructive malice which was always held sufficient to amount to murder was if a police officer was killed in the execution of his duty. If a person was resisting arrest before the Act of 1957 and caused the death of a police officer, although he might only have used a little violence on the officer he was guilty of murder. Murder is, of course, killing with malice aforethought, but "malice aforethought" is a term of art. It has always been defined in English law as, either an express intention to kill, as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on a victim, or implied, where, by a voluntary act, the accused intended to cause grievous bodily harm to the victim and the victim died as the result. If a person does an act which amounts to the infliction of grievous bodily harm he cannot say that he only intended to cause a certain degree of harm. It is called malum in se in the old cases and he must take the consequences. If he intends to inflict grievous bodily harm and that person dies, that has always been held in English law, and was at the time this Act was passed, sufficient to imply the malice aforethought which is a necessary constituent of murder.

It will be observed that the section preserves implied malice as well as express malice, and the words "Where a person kills "another in the course or furtherance of some other offence" cannot, in our opinion, be referred to the infliction of the grievous bodily harm if the case which is made against the accused is that he killed a person by having assaulted the person with intent to do grievous bodily harm, and from the bodily harm he inflicted that person dies. The "furtherance of some other offence" must refer to the offence he was committing or endeavouring to commit other than the killing, otherwise there would be no sense in it. It was always the English law, as I have said, that if death was caused by a person in the course of committing a felony involving violence that was murder. Therefore, in the present case it is perfectly clear that the words "Where a person "kills another in the course or furtherance of some other "offence" must be attributed to the burglary he was committing. The killing was in the course or furtherance of that burglary. He killed that person in the course of the burglary because he realized that the victim recognized him and he therefore inflicted grievous bodily harm on her, perhaps only intending to render her unconscious, but he did intend to inflict grievous bodily harm by the blows he inflicted upon her and by kicking her in the face, of which there was evidence. The section then goes on: "the killing shall not amount to murder unless done "with the same malice aforethought (express or implied) as is "required for a killing to amount to murder when not done in "the course or furtherance of another offence." It would seem clear, therefore, that the legislature is providing that where one has a killing committed in the course or furtherance of another offence, that other offence must be ignored. What have to be considered are the circumstances of the killing, and if the killing would amount to murder by reason of the express or implied malice, then that person is guilty of capital murder. It is not enough to say he killed in the course of the felony unless the killing is done in a manner which would amount to murder ignoring the commission of felony. It seems to the court, therefore, that in the present case, a burglar attacked a householder to prevent recognition. The householder died as the result of blows inflicted upon her—blows or kicks or both—and if this section had not been passed there could be no doubt that the appellant would have been guilty of murder. He is guilty of murder because he has killed a person with the necessary malice aforethought being implied from the fact that he intended to do grievous bodily harm.

I will now briefly refer to the summing-up of Hinchcliffe J., which I have already said the court thinks is quite impeccable. He said to the jury: "If you are not satisfied that the charge of

C. C. A.
1957

REGINA
v.
VICKERS.

"capital murder has been proved, that is to say, if you are in "doubt whether the accused man had the intention to inflict "grievous bodily harm upon Miss Duckett, it is right that in "these circumstances the accused would be guilty of manslaughter, if you were satisfied that the accused had brought "about the old lady's death without any malice, without any "intention to do her grievous bodily harm." Again, he said: "If capital murder is not so proved and you come to the conclusion that the accused killed Miss Duckett without any "malice, that is, without intending her any harm, or only trifling "harm, then your verdict will be one of guilty of manslaughter"—for instance, a push to get her out of the way. Further, he said: "Murder is with the intention to kill or to do "grievous bodily harm; manslaughter is an unlawful killing, but "without any intention." Finally, he gave this direction to the jury: "Malice will be implied, if the victim was killed by a "voluntary act of the accused—and here is the importance of "what I am going to say—done with the intention either to "kill or to do some grievous bodily harm. The grievous bodily "harm need not be permanent, but it must be serious, and it is "serious or grievous if it is such as seriously and grievously to "interfere with the health or comfort of the victim," and "Ask "yourselves: Is it proved that the accused man killed Miss "Duckett with malice, that is, when he struck the blows he "intended to do her serious bodily harm?"

The court desires to say quite firmly that in considering the construction of section 1 (1) it is impossible to say that the doing of grievous bodily harm is the other offence which is referred to in the first line and a half of the section. One has to show, independently of the fact that the accused is committing another offence, that the act which caused the death was done with malice aforethought as implied by law. The existence of express or implied malice is expressly preserved by the Act and, in our opinion, a perfectly proper direction was given by Hinchcliffe J. to the jury, and accordingly this appeal fails and is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

C. J. E.

END OF VOL. II AND OF QUEEN'S BENCH SERIES FOR 1957.

The Mode of Citation of the Volumes of the *Law Reports* for 1957, is as follows:—

[1957] Ch. [1957] P.
[1957] 1 Q.B. [1957] 2 Q.B.
[1957] A.C.

INDEX

AGRICULTURE — *Agricultural holding — Repairs—Compensation—Notice of intention to claim by landlord—Form—Notice setting out alternative claims based on tenancy agreement and statute—Whether valid notice —Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 57, 70.
Boyd *v.* Wilton - - - - **C.A. 277**

2. —— *Agricultural holding—Tenancy—Protection—Letting of land for mowing and grazing for period of three months—Subsequent extensions, by new agreements, for like periods—Claim by landlords for possession—Contemplation of parties—Whether let during some specific period of the year—Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 2 (1), *proviso.*
Scene Estate Ltd. *v.* Amos - **C.A. 205**

ANIMAL — *Ferae naturae — Elephant — Whether ferae naturae—Liability of owner for acts of animal ferae naturae not flowing from savage disposition—Whether wrongful act of third party a defence — Midget injured when booth in funfair knocked down by elephant—Elephant irritated by dog introduced into booth by third party—Prohibition against introduction of dogs—Tame Burmese circus elephant —Midgets licensees of booth—Knowledge by midgets that elephants passing booth—Applicability of maxim volenti non fit injuria.*
Rylands *v.* Fletcher. *Volenti non fit injuria.*
Damages—Personal injuries—Husband and wife—Both midgets—Choice of husband not to work while wife incapacitated — Exceptional dependence of married midgets upon each other — Choice reasonable — Husband entitled to recover loss of earnings during period of wife's incapacity.
Judicial Precedent — Ratio decidendi — Two reasons for decision—Both binding.
Behrens *v.* Bertram Mills Circus Ltd.
Devlin J. 1

ARBITRATION — Case stated — Form. See Shipping—Charterparty.

2. —— Case stated — Interim award. See Shipping—Charterparty.

ARCHITECT—*Discipline—Architects' Discipline Committee—Appeal from—" Disgraceful " conduct " — Meaning — Registered architect practising as architect and estate agent—Combined practice contrary to code drawn up subsequent to architect's registration—Removal from register—Power of court to review committee's decision—Effect of code on architect —Architects (Registration) Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 33), *ss.* 7 (1), 9.
Tribunal — Statutory — Control by courts— Discipline Committee of Architects' Registration Council—Jurisdiction of court.
Hughes *v.* Architects' Registration Council of the United Kingdom - **Divl.Ct. 550**

BREACH OF STATUTORY DUTY — Coal mine. See Judge.

COMPANY — Investment company — Profits tax. See Revenue.

CONFLICT OF LAWS — *Succession — Corporation — Foreign legislation — Comity — Universal succession—Foreign bank liable on English debt—Obligations on debt suspended in foreign bank's State of origin by moratorium—Legislation by foreign State merging debtor bank with another bank in State of origin—New amalgamated bank decreed " universal successor " to former banks—Recognition of universal succession by English courts —Right of creditor to sue new bank in England—Companies Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 208.
Conflict of Laws—Foreign legislation.
Metliss *v.* National Bank of Greece and Athens S.A. - - - - - **C.A. 33**

CONTEMPT OF COURT—*Mens rea—Newspaper article — Innocent dissemination — Foreign periodical—Article prejudicial to defendant in criminal proceedings—Periodical edited and printed abroad—No responsible editor or manager in this country—Importers and distributors no knowledge of contents of periodical—Liability of distributors—Whether innocent dissemination a defence.*
Regina *v.* Griffiths. *Ex parte* Attorney-General - - - - - **Divl.Ct. 192**

CONTRACT—Constitution—Repugnancy. See Shipping—Charterparty.

2. —— Illegality. See Shipping.

3. —— Repudiation — Anticipatory breach. See Shipping—Charterparty.

COUNTY COURT—*Jurisdiction—Action for recovery of land—Mortgagee's claim for possession of mortgaged property—Annual value less than £100—Amount due and owing in respect of mortgage in excess of £500—Whether "action for the recovery of land"—Whether "proceedings . . . for enforcing any "charge or lien"—Right of mortgagee to bring action in county court—County Courts Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *ss.* 48, 52 (1) (*c*) (*as amended*).

Mortgage—Possession, mortgagee's right to —Jurisdiction of county court—Whether action for the recovery of land or proceedings to enforce charge.

Regina *v.* Judge Dutton Briant. *Ex parte* Abbey National Building Society
Divl.Ct. 497

COURT OF CRIMINAL APPEAL—Practice. See Criminal Law—Sentence.

CRIMINAL LAW—Election to go for trial. See Justices.

2. —— *Mens rea—"Maliciously"—Causing coal gas to be taken so as to endanger life—Whether "wickedness" equivalent to "malice" in statutory crime—Whether "mali- "ciously" postulates foresight of consequence —Offences against the Person Act*, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 23.

Regina *v.* Cunningham - - **C.C.A. 396**

3. —— *Murder—Killing in course of other offence—Intention to maim—Burglary—Malice aforethought—Application of new law—Construction—Homicide Act*, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 1 (1).

Regina *v.* Vickers - - - **C.C.A. 664**

4. —— *Plea — Fitness to plead — Whether the defence can require the general issue to be tried before the issue of fitness to plead.*

Regina *v.* Beynon - - **Byrne J. 111**

5. —— *Sentence—Fine—Death of accused —Imprisonment and fine—Imprisonment and fine imposed by quarter sessions for felony — "Additional imprisonment" in default — Death of felon while serving sentence—Right of Crown to recover fine from personal representatives—Levy of Fines Act*, 1822 (3 *Geo.* 4, *c.* 46), *s.* 2—*Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 13, 14, 15.

Crown Proceedings—Fine—Recovery—Death of debtor.

Treasury *v.* Harris
Lord Goddard C.J. 516

CRIMINAL LAW—*continued.*

6. —— *Sentence—Supervision order—Previous convictions — Offence committed while on probation for previous offence—Concurrent sentences of* 12 *months' imprisonment imposed by same court on same day—Order to report on discharge made after conviction for subsequent offence—Whether convicted on two previous occasions—Criminal Justice Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 22 (1), *as amended by Prison Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 52), *s.* 29 (1).

Criminal Law—Court of Criminal Appeal—Sentence, appeal against—Practice—Appeals against sentence in cases sent to quarter sessions—Committal order to be sent to Court of Criminal Appeal for rectification if sentence altered.

Regina *v.* Perfect - - - **C.C.A. 107**

CROWN PROCEEDINGS—Fine—Death of debtor. See Criminal Law—Sentence.

2. —— *Post Office—Liability in contract—Registered overseas postal packets—Theft by postal servant — Whether claim in contract maintainable—Post Office Act*, 1908 (8 *Edw.* 7, *c.* 48), *ss.* 12, 13—*Crown Proceedings Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 44), *s.* 9 (1) (2)—*British Commonwealth and Foreign Post Warrant*, 1948 (*S.I.* 1948, *No.* 590), *reg.* 61.

Judicial Precedent — Decision long undisturbed — Weight — Liability of Post Office in contract.

Triefus & Co. Ltd. *v.* Post Office
C.A. 352

DAMAGES—Husband and wife—Incapacitation of wife. See Animal.

2. —— *Sale of goods — Failure to accept and pay for goods—Delivery of motor-car refused by buyer—Sold to another purchaser —Whether dealer entitled to loss of profit on repudiated sale—Fixed retail price—"Avail- "able market"—Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 50 (2) (3).

Charter *v.* Sullivan - - - **C.A. 117**

DEFAMATION—Privilege. See Libel and Slander.

DRUG—Insulin. See Road Traffic.

ESTOPPEL. See Sale of Goods.

FINE—Death of debtor—Recovery by Crown. See Criminal Law—Sentence.

FRIENDLY SOCIETY. See Rates and Rating.

HIGHWAY—Case stated by quarter sessions —No error in law. See Justices.

HIRE-PURCHASE. See Sale of Goods.

HOUSING—*Unfit for human habitation—Underground room—Non-compliance with local authority regulations—Closing order—Standard of fitness applicable—"House"—Housing Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 12 (2)—*Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *s.* 9.
Statute—Repeal—Implied repeal—Housing Acts.
Judicial Precedent—Court of Appeal decision—Per incuriam—Point not fully argued.
CRITCHELL *v.* LAMBETH BOROUGH COUNCIL **C.A. 535**

2. —— *Unfit for human habitation—Underground room—Rent restriction—Repairs and rent—Notice of increase—Proceedings in county court by landlord to recover increase—Whether premises fit for occupation—Standard applicable to underground room—Housing Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 12 (2)—*Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 53), *ss.* 9, 23, 49.
LONDON HOSPITAL GOVERNORS *v.* JACOBS (No. 2) - - - - - - **C.A. 528**

ILLEGALITY. See SHIPPING.

INJUNCTION—Sign overhanging premises. See TRESPASS—Airspace.

INSULIN — Whether "drug." See ROAD TRAFFIC.

JUDGE—*Conduct of—Evidence of witnesses—Interventions by judge—Roles of judge and advocate.*
Mines and Minerals—Coal—Breach of statutory duty—"Reasonably practicable to avoid "breach"—Test of liability at common law—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 49, 102 (8).
JONES *v.* NATIONAL COAL BOARD - **C.A. 55**

JUDICIAL PRECEDENT—Point not fully argued. See HOUSING.

2. —— Ratio decidendi. See ANIMAL.

3. ——. See CROWN PROCEEDINGS—Post Office.

JUSTICES—*Case stated—Quarter sessions—Inferences from facts found by quarter sessions—No error in law—Intention to dedicate footpath—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 25—*National Parks and Access to the Countryside Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 97), *s.* 31 (7).
Highway—Case stated.
CHIVERS & SONS LTD. *v.* CAMBRIDGE COUNTY COUNCIL. TRUSTEES OF THE NATIONAL INSTITUTE OF AGRICULTURAL BOTANY REGISTERED *v.* CAMBRIDGE COUNTY COUNCIL - - **C.A. 68**

JUSTICES—*continued.*

2. —— *Election to go for trial—Indictable offence triable summarily—Consent to summary trial—Magistrate's right to allow accused to withdraw consent—Power of court to proceed to inquire as examining justices—Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 19 (5), 24.
REGINA *v.* CRASKE. *Ex parte* METROPOLITAN POLICE COMMISSIONER - - **Divl.Ct. 591**

3. ——. See WEIGHTS AND MEASURES.

LANDLORD AND TENANT—*Business premises (security of tenure)—"Business"—Members' club—"Any activity carried on by "a body of persons, whether corporate or "unincorporate"—Lawn tennis club occupying clubhouse and tennis courts under tenancy agreement—Club registered under Industrial and Provident Societies Act,* 1893, *to carry on business of lawn tennis club—Whether business tenancy—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *Part II*, *s.* 23 (2).
ADDISCOMBE GARDEN ESTATES LTD. *v.* CRABBE **Hilbery J. 615**

2. —— Parcels—Air-space. See TRESPASS.

3. —— *Rent tribunal—Furnished premises—Rent registered—Increase of rent—Change of lessee—Contract of letting reserving approved rent—Application by lessors to tribunal for reconsideration—Rent increased—Whether lessee liable to pay increased rent—Jurisdiction of tribunal to effect statutory modification of contract—Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *ss.* 2, 4.
VILLA D'ESTE RESTAURANT LTD. *v.* BURTON **C.A. 214**

4. ——. See AGRICULTURE.

LIBEL AND SLANDER—*Libel—Newspaper—Qualified privilege—Request for apology—Form—"Public meeting"—Restricted admission—Members of students' federation and guests only—Defamation Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 66), *s.* 7, *Sch.*, *Pt. II*, *para.* 9.
KHAN *v.* AHMED - - **Lynskey J. 149**

LIMITATION—Deprivation of defence of by amendment of pleading. See SOLICITOR—Negligence.

MINES AND MINERALS — Coal. See JUDGE.

MORTGAGE—Right to possession—Jurisdiction of county court. See COUNTY COURT.

NATIONAL INSURANCE — *Contribution — Failure to pay—Conviction for failing to pay one contribution—Order for payment of arrears —Committal for failure to comply with order —Whether "enforceable as a civil debt"—Whether "recoverable as a penalty"—National Insurance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 67), *ss.* 8 (1) (*e*), 54 (1)—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 64, *Sch. III, paras.* 1, 4 — *National Insurance (Contributions) Regulations,* 1948 (*S.I. No.* 1417 *of* 1948), *reg.* 19 (5).
REGINA *v.* MARLOW (BUCKS) JUSTICES. *Ex parte* SCHILLER - - - - **Divl.Ct. 508**

2. —— *Industrial injuries benefit—"Paired "organs" principle—Injury to fingers—Fingers part of the hand—Hands paired organs — National Insurance (Industrial Injuries) (Benefit) Regulations,* 1948 (*S.I.* 1948, *No.* 1372), *reg.* 2 (5).
REGINA *v.* MEDICAL APPEAL TRIBUNAL AT LONDON. *Ex parte* BURPITT - **Divl.Ct. 584**

NEGLIGENCE — *Safe system of work — Dangerous employee—Injury caused to fellow workman — Failure by employer to prevent habitual horse-play of one workman known to be likely to injure other servants.*
HUDSON *v.* RIDGE MANUFACTURING CO. LTD. **Streatfeild J. 348**

2. —— *Safe system of work — Plant and equipment — Latent defect — Injury to workman's eye caused by tool with latent defect—Tool supplied by reputable supplier — Tool made by reputable makers—Tool negligently made—Employers' liability—Makers' liability.*
Negligence—Duty of care—Manufacturer.
DAVIE *v.* NEW MERTON BOARD MILLS LTD. **Ashworth J. 368**

3. ——. See SOLICITOR.

NUISANCE—*Public—Class of public affected —Whether sufficient number—Question of fact or law—Quarry—Projection of stones by blasting—Dust and vibration—Injunction— "Public nuisance"—Distinction from private nuisance—Injunction.*
ATTORNEY-GENERAL *v.* P.Y.A. QUARRIES LTD. **C.A. 169**

PER QUOD SERVITIUM AMISIT. See POLICE—Wages.

POLICE—*Wages—Wages during incapacity — Recovery — Injury to constable through negligence of defendants—Wages during incapacity paid by police authority—Right of recovery by police authority from defendants of money paid—Power of police authority to sue defendants for money paid.*
Restitution—Unjust enrichment.
RECEIVER FOR METROPOLITAN POLICE DISTRICT *v.* CROYDON CORPORATION. MONMOUTHSHIRE COUNTY COUNCIL *v.* SMITH - **C.A. 154**

POST OFFICE—Liability in contract. See CROWN PROCEEDINGS.

PRACTICE—Amendment depriving defendant of defence under Limitation Act, 1939. See SOLICITOR—Negligence.

RATES AND RATING — *Plant and machinery — Oil refinery — Topping unit— Whether a "still"—"Parts of a plant"— "In the nature of a building or structure"— Meaning — Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 24 (1), *Sch. III— Plant and Machinery (Valuation for Rating) Order,* 1927 (*S.R. & O.,* 1927, *No.* 480), *Sch., Class* 4.
B.P. REFINERY (KENT) LTD. *v.* WALKER (VALUATION OFFICER) - - - **C.A. 305**

2. —— *"Social welfare"—Friendly society —Convalescent home—Society providing benefits and assurance for members—Benefits provided on actuarial basis—Claim by society for rating relief under section 8 of the Rating and Valuation (Miscellaneous Provisions) Act,* 1955 *—No element of advancement of good of community—Objects of the society not "concerned "with the advancement . . . of social welfare" —Society not entitled to rating relief in respect of convalescent home—Rating and Valuation (Miscellaneous Provisions) Act,* 1954 (4 *Eliz* 2, *c.* 9), *s.* 8.
Friendly Society.
TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY *v.* SKEGNESS URBAN DISTRICT COUNCIL **C.A. 573**

RESTITUTION. See POLICE—Wages.

RESTRICTIVE COVENANT — *Obsolete — Modification—Continued existence of covenant "would impede the reasonable user"—Meaning—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 84 (1) (*a*).
In re GHEY AND GALTON'S APPLICATION **C.A. 650**

REVENUE — *Profits tax — Investment company — Direction by special commissioners — Computation of company's actual income — Deduction of amount payable by company for profits tax—Whether profits tax "payable" before election — Meaning of "payable" — When tax "falls to be computed"—Finance Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 31 (3)— *Whether direction required if nil actual income —"Payable"—Finance Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 33), *s.* 68—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 262.
Revenue—Surtax—Company.
REGINA *v.* INCOME TAX SPECIAL COMMISSIONERS. *Ex parte* LINSLEYS (ESTABLISHED 1894) LTD. - - - **Divl.Ct. and C.A. 78**

ROAD TRAFFIC—*Drug, driving under influence of — Meaning of "drug" — Insulin— Whether a drug—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 15 (1).
ARMSTRONG *v.* CLARK - - **Divl.Ct. 391**

RYLANDS v. FLETCHER—Rule in. See ANIMAL.

SALE OF GOODS—*Nemo dat quod non habet—Estoppel—Motor-car—Owner giving seller documents enabling seller to represent himself as owner—Limitation upon seller's authority—Sale without authority—Whether property passed—Hire-purchase agreement between purchaser and owner—Whether subsequent bona fide purchaser for value from former owner obtained good title—Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 21 (1), 25 (1).

Hire-Purchase—Hire-purchase agreement—Enforceability—Blank forms signed by hirer—Whether "valid note or memorandum of "the agreement . . . made and signed by "the hirer"—Unenforceable agreement—Whether right to possession of owner enforceable against third parties—Hire Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *ss.* 2 (2), 17.

Estoppel—By conduct—Motor-car—Hire-purchase—Owner of hire-purchase documents signed in blank and given to car dealer—Sale by car dealer to hire-purchase company—Representation by dealer of ownership—Owner privy to representation—Subsequent sale by owner—In whom title resides.

EASTERN DISTRIBUTORS LTD. *v.* GOLDRING (MURPHY, THIRD PARTY) - - **C.A. 600**

2. —— Non-acceptance—Loss of profit. See DAMAGES.

SHIPPING—*Bill of lading—Indemnity for clean bill—Goods "shipped in apparent good "order and condition"—Statement false to knowledge of shipowner—Indemnity taken—Whether enforceable.*

Contract—Illegality.

BROWN JENKINSON & CO. LTD. *v.* PERCY DALTON (LONDON) LTD. - - - **C.A. 621**

2. —— *Charterparty—Clause paramount—"This bill of lading" subject to Act—Whether clause meaningless—Hague Rules—"Loss or damage arising . . . from un-"seaworthiness"—Meaning of "loss or "damage"—Whether applicable to non-cargo-carrying voyages—Whether applicable only to physical loss or damage—Carriage of Goods by Sea Act of United States*, 1936, *ss.* 2, 3 (1), 4 (1) (2), 5 *and* 13—*Carriage of Goods by Sea Act*, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Schedule, Arts. II, III, rr.* 1, 8; *IV, rr.* 1, 2; *V.*

Contract—Construction—Repugnancy.

Shipping—Charterparty—Consecutive voyage charter—Extent and nature of owners' obligations to provide and maintain seaworthy vessel during "the voyage"—Continuing warranty of seaworthiness, perils of sea excepted—"Proceed with all convenient despatch"—Vessel rendered unseaworthy by incompetence of staff—Owners vicariously liable for negligence of servants despite owners' exercise of due diligence in selection and appointment of staff—Delays—Whether claim for loss of services of vessel sustainable—Basis for assessment of damages.

Arbitration—Case stated—Form—Undesirability of construing with too rigid an eye.

ANGLO-SAXON PETROLEUM CO. LTD. *v.* ADAMASTOS SHIPPING CO. LTD.

Devlin J. and C.A. 233

3. —— *Charterparty — Demurrage — "Weather working days"—Meaning—Rain during period when no work being done or contemplated—"Laydays in loading and dis-"charging to be calculated on the basis of 24 "hours per day."*

COMPANIA NAVIERA AZUERO S.A. *v.* BRITISH OIL AND CAKE MILLS LTD. - **Pearson J. 293**

4. —— *Charterparty — Voyage — Anticipatory breach — Renunciation or impossibility —Failure to load—Inability of charterer to nominate shipper, or berth, or to provide cargo —Whether breaches of condition or warranty —Charterparty cancelled by shipowners before expiry of lay days—Whether justified—Delay justifying rescission—Proper test to be applied.*

Contract—Repudiation—Anticipatory breach —Nature of.

Arbitration—Case stated—Form—Interim award—Undesirability of setting out evidence. Arbitration—Case stated—New point of law—Court's right to consider—Question of law left in general form. Arbitration—Case stated—Remission to arbitrator—Relevant facts not found—Duty of party to apply for remission—Court's power to remit—R.S.C., Ord. 64, *r.* 14 *—Arbitration Act*, 1950 (14 *Geo.* 6, *c.* 27), *s.* 22.

Commercial Court—Value of—Superiority to arbitration—Questions of mixed fact and law.

Contract—Frustration—Fact or law—Period of delay—Arbitration. Fact or law.

UNIVERSAL CARGO CARRIERS CORPORATION *v.* CITATI - - - - - **Devlin J. 401**

SOLICITOR — *Negligence — Will — Solicitor instructed by man and woman to draft wills conferring benefits on each other — Jocular reference to possibility of marriage — Subsequent marriage of clients—Failure of solicitor to advise on revocation of wills by subsequent marriage—Consequent loss by client of benefits conferred on her by man's will — Duty of solicitor.*

Practice—Pleadings—Statement of claim—Amendment setting up new cause of action—Defendant deprived of defence under Statute of Limitations, 1939 (2 *&* 3 *Geo.* 6, *c.* 21)—*Rule of practice.*

Practice—Order—Recall—Order not drawn up—Amendment of pleading.

HALL *v.* MEYRICK

Ashworth J. and C.A. 455

STATUTE — *Commencement — Date — Act applicable abroad — To come into force on January 1, 1957 — Offences committed by troops in Hong Kong on January 1, 1957, by Hong Kong time—In advance of Greenwich mean time—Act not in force in Great Britain—Whether in force in Hong Kong—Army Act*, 1955 (3 *&* 4 *Eliz.* 2, *c.* 18), *s.* 226 (2)—*Army Act*, 1955 (*Commencement*) *Order*, 1955 (*S.I.* 1955, *No.* 1805).
Regina *v.* Logan - - **C.-M.A.C. 589**

2. —— Construction. See Town and Country Planning.

3. —— Construction. See Trade Dispute.

4. —— Repeal—Implied. See Housing.

STATUTORY DUTY — Breach — Coal mine. See Judge.

TOWN AND COUNTRY PLANNING—*Enforcement notice — Form — Compliance with statutory requirements — No appeal against notice—Failure to comply with requirements of notice — Subsequent prosecution — Whether evidence admissible to prove development had not taken place—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 24.
Norris *v.* Edmonton Corporation
Divl.Ct. 564

2. —— *Enforcement notice—Form—Validity of notice—Notice alleging development without permission — Permission for limited period granted by Minister—Effect of owner's failure to appeal to justices — Whether barred from questioning notice in High Court—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23 (2) (4), 24 (1) (3).
Statute—Construction—Jurisdiction of High Court—Not to be taken away save by clear words.
Francis *v.* Yiewsley and West Drayton Urban District Council - **McNair J. 136**

TRADE DISPUTE—*Industrial Disputes Tribunal — Jurisdiction — Claim by workman for promotion—Resolution passed by union meeting to refer matter to tribunal — "Dispute" arising out of workman's claim referred by union to Minister—Members of union parties to the dispute—Dispute between "workmen" and employers — Dispute connected with the terms of the employment of "any of those "workmen"—Industrial Disputes Order*, 1951 (*S.I.* 1951, *No.* 1376), *arts.* 10, 12 (1).
Statute — Construction — Plural — Whether including singular—Industrial dispute—Interpretation Act, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 1.
Regina *v.* Industrial Disputes Tribunal. *Ex parte* Queen Mary College, University of London - - - - **Divl.Ct. 483**

TRESPASS—*Airspace—Projection from building—Advertising sign—Whether invasion of airspace by projection trespass or nuisance—Whether damages or injunction appropriate remedy.*
Landlord and Tenant—Parcels—Airspace—Presumption that airspace above demised premises is itself demised.
Injunction—Trespass—Airspace—Sign overhanging premises—Mandatory injunction.
Kelsen *v.* Imperial Tobacco Co. (of Great Britain and Ireland) Ltd. - **McNair J. 334**

TRIAL—Interventions by judge. See Judge.

TRIBUNAL—Statutory. See Architect.

UNJUST ENRICHMENT. See Police—Wages.

WEIGHTS AND MEASURES — *Offence — "Actual offender"—Conviction of a company —Liability of manager—Sale of Food (Weights and Measures) Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *ss.* 4 (2), 12 (5).
Judicial Precedent — Divisional Court decision—Per incuriam—Not binding on Divisional Court.
Melias Ltd. *v.* Preston - **Divl.Ct. 380**

BIBL. LONDIN. UNIV.

UL. 8.5.58.